United States Court of Appeals

for the Second Circuit

APPENDIX

No. 75-7332

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

Docket No. 75-7332

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, *Plaintiff-Appellee,*

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, *and* BURLINGTON INDUSTRIES, INC., *Defendants-Appellants.*

UNITED STATES COURT OF APPEALS
FILED
NOV 21 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7332

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD.,
IN BANKRUPTCY PROCEEDINGS, *Plaintiff-Appellee,*

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, *and*
BURLINGTON INDUSTRIES, INC., *Defendants-Appellants.*

JOINT APPENDIX

Volume I

SUMMONS IN A CIVIL ACTION 1 D. C. Form No. 45 Rev. (6-49)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Issued 12/14/66 11 A.M.

CIVIL ACTION FILE NO. 4230

TEXTURA LTD., FEBESTPA FABRICS CO. and MALCOLM G. POURIE,

Plaintiffs,

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants.

SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon REGAN GOLDFARB POWELL & QUINN

plaintiff's attorneys, whose address is 230 Park Avenue, New York, New York 10017,

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN J. [illegible]

Clerk of Court.

E. [illegible]

Deputy Clerk.

Date: December 9, 1966

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

No.

United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

TEXTURA LTD., FENESTRA FABRICS CO. and MALCOLM G. POWRIE,

Plaintiffs,

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants.

SUMMONS IN CIVIL ACTION

Returnable not later than 20 days after service.

REGAN GOLDFARB POWELL & QUINN
230 Park Avenue
New York, New York 10017
Attorneys for Plaintiffs

FPI—LK—2-23-62—120M—416

I hereby certify and return, that on the 2 day of , 19 ,

I received this summons and served it together with the complaint herein as follows:

MARSHAL'S FEES

Travel $

Service

United States Marshal.

By *Deputy United States Marshal.*

Subscribed and sworn to before me, a this day of , 19 .

[SEAL]

Note.—Affidavit required only service is made by a person other than a United States Marshal or his Deputy.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXTURA LTD., FENESTRA FABRICS INC. and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants.

COMPLAINT

Civil Action No.

Plaintiffs TEXTURA LTD., FENESTRA FABRICS INC. and MALCOLM G. POWRIE, by their attorneys, REGAN GOLDFARB POWELL & QUINN, for their complaint herein allege as follows:

1. This action is brought under Section 4 of the Act of Congress of October 15, 1914 commonly known as the Clayton Act (15 U.S.C.A. §15), as amended and supplemented, to recover threefold the damages sustained by plaintiffs in their business and property, and for injunctive relief, by reason of violations by defendants of Sections 1 and 2 of the Act of Congress of July 2, 1890 commonly known as the Sherman Act (15 U.S.C.A. §§1 and 2), as amended and supplemented, and of Sections 2(a) and (e) of the aforesaid Clayton Act as amended by the Act of Congress of June 19, 1936

commonly known as the Robinson-Patman Act (15 U.S.C.A. §§13(a) and (e)).

2. The parties hereto and the transactions herein complained of or referred to were and are in interstate commerce.

3. Each of the defendants herein is an inhabitant of, or resides, is found, transacts business or has an agent in the Southern District of New York.

4. Venue of this action is proper by virtue of Sections 4 and 12 of the aforesaid Clayton Act (15 U.S.C.A. §§15 and 22).

5. Plaintiff TEXTURA LTD. (hereinafter called "TEXTURA") is and has been, since March 9, 1962, at all times hereinafter mentioned a corporation organized and existing under the laws of the State of California, with its principal offices in the City of Los Angeles, State of California. At all pertinent times herein TEXTURA has been engaged, directly or through its former affiliate and predecessor in interest, GLASS FABRICS, INC.,

in the purchase of fiber glass decorative fabrics, their conversion into draperies and the sale thereof for various uses in office, commercial, apartment, public and other buildings. GLASS FABRICS, INC., a California corporation since April 18, 195., was dissolved in December 1964, at which time its assets were acquired by TEXTURA.

6. Plaintiff FENESTRA FABRICS INC. (hereinafter called "FENESTRA") is and has been since January 4, 1960, a corporation organized and existing under the laws of the State of California, with its principal offices in the City of Los Angeles, California. Until December 1964, FENESTRA was a wholly-owned subsidiary of GLASS FABRICS, INC., and thereafter of TEXTURA, until August 1, 1966, at which time its stock was acquired by the stockholders of TEXTURA. At all pertinent times herein, FENESTRA has undertaken the direct sale and installation of fiber glass draperies in large commercial buildings with materials and labor supplied by TEXTURA and/or GLASS FABRICS, INC.

7. Plaintiff MALCOLM G. POWRIE (hereinafter called "POWRIE") is and was at all times hereinafter mentioned a citizen of the United States and resident of the State of California. POWRIE was formerly the President of GLASS FABRICS, INC., and is and has been President of TEXTURA and FENESTRA since their

organization. POWRIE has held a majority of the stock of TEXTURA and FENESTRA since in or about 1963 and August 1, 1966, respectively.

8. Upon information and belief, defendant CLARK-SCHWEBEL FIBER GLASS CORPORATION (hereinafter called "CLARK-SCHWEBEL") is and has been since 1961 a corporation organized and existing under the laws of the State of New York, with its principal offices in the City, County and State of New York, and engaged in the business, among other things, of weaving and selling fiber glass decorative fabrics.

9. Upon information and belief, defendant BURLINGTON INDUSTRIES, INC. (hereinafter called "BURLINGTON") is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the City, County and State of New York and engaged in the business of selling textiles and allied products. Upon information and belief, BURLINGTON entered the business of weaving and selling fiber glass decorative fabrics in or about February 1956 by acquiring HESS, GOLDSMITH & COMPANY, INC., a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the City, County and State of New York, which was engaged in such business; and has continued there-

after in such business by operating HESS, GOLDSMITH & COMPANY, INC. as a wholly-owned subsidiary, until in or about September 1962, and subsequently as a division of BURLINGTON. Whenever reference is made herein to defendant BURLINGTON, such reference shall be deemed to include HESS, GOLDSMITH & COMPANY, INC.

10. Upon information and belief, defendant J. P. STEVENS & COMPANY, INC. (hereinafter called "STEVENS") is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the City, County and State of New York, and engaged in the business of weaving and selling fiber glass decorative fabrics.

11. Upon information and belief, L. F. DOMMERICH & CO., INC. (hereinafter called "DOMMERICH") is and was at all times hereinafter mentioned a corporation organized in and existing under the laws of the State of New York with its principal offices in the City, County and State of New York, and engaged in business, among other things, as a factor. From in or about 1962 until October 10, 1966, DOMMERICH was employed under contract

as a factor by TEXTURA and also made loans and advances of money on occasion to TEXTURA. DOMMERICH is not made a defendant herein, but is hereby named as a co-conspirator.

12. The following officers and employees of the corporate defendants and of DOMMERICH are hereby named as co-conspirators:

INDIVIDUAL	CORPORATION	CAPACITY
J. P. SCHWEBEL	CLARK-SCHWEBEL	President
RAYMOND P. NORDHEIM	CLARK-SCHWEBEL	Vice-President
WILLIAM COLTON	BURLINGTON	President
ERVIN A. SCHUTZ	BURLINGTON	Vice-President
CHARLES A. KELLY	BURLINGTON	Asst.to MR. SCHUTZ
JACK G. CANN	BURLINGTON	Credit Dept.
ROBERT A. KNISEL	STEVENS	Credit Dept.
LOUIS MOSKEWITZ	DOMMERICH	President.

13. The acts charged herein to have been done by the defendant and co-conspirator corporations were authorized, ordered, or done by the officers, agents, employees or representatives of such corporations while actively engaged in the manage-

ment, direction or control of their affairs, including the individuals named as co-conspirators herein.

14. All of the foregoing allegations are hereby incorporated by reference in each of the causes of action asserted herein as if fully set forth therein.

AS AND FOR A FIRST, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF TEXTURA ALLEGES:

15. At all times mentioned herein, TEXTURA (and/or its former affiliate and predecessor in interest, GLASS FABRICS, INC.) has purchased or sought to purchase all or substantially all of its requirements of fiber glass decorative fabrics from the defendants herein, commencing at least as early as 1956 in the case of defendants BURLINGTON and STEVENS, and in or about June 1963 in the case of defendant CLARK-SCHWEBEL.

16. With respect to such purchases, the defen-

dants, until in or about July 1966, extended credit to TEXTURA on terms which were accorded to competing purchasers of fiber glass decorative fabrics.

17. Because of quality control problems it has been necessary in the fiber glass decorative fabric industry for the weavers, including the defendants herein, to accept returns of inferior quality material from purchasers or to make adjustments in price therefor, through credits or otherwise. Until in or about October 1964, the defendants herein followed this practice with TEXTURA, as with competing purchasers, and made price reductions or allowed credits for all material of inferior quality purchased from them by TEXTURA.

18. Since in or about at least 1964, the exact date being unknown to plaintiff, the defendants herein have been engaged in an unlawful and continuing combination and conspiracy (hereinafter called "the conspiracy") in unreasonable restraint of interstate trade and commerce in fiber glass decorative fabrics, in violation of Section 1 of the Sherman Act.

19. The aforesaid combination and conspiracy

has consisted of continuing agreements, understandings and concerted actions by and between the defendants to restrain, suppress, avoid and eliminate price competition in the sale of fiber glass decorative fabrics by fixing, stabilizing and maintaining prices and terms and conditions, including the extension of credit and the adjustment of quality claims, for the sale of said fabrics to customers.

20. In furtherance of the aforesaid conspiracy, commencing in or about October 1964, defendant CLARK-SCHWEBEL determined to coerce, force and induce TEXTURA to cease and desist from submitting and pursuing claims with respect to the inferior quality of fiber glass decorative fabrics purchased by TEXTURA from said defendant, and obtaining price adjustments or credits therefor, or failing in that, to injure and destroy TEXTURA'S business and eliminate TEXTURA from competition with other customers of said defendant.

21. Thereafter, in furtherance of the conspiracy, the defendants herein and the co-conspirators entered into various agreements and took concerted actions, the aim, object and purpose of which was and is to coerce, force and induce TEXTURA to cease and desist from submitting and pursuing the aforesaid

claims with respect to inferior quality, or failing in that, to injure, and destroy TEXTURA'S business and eliminate TEXTURA from competition with other customers of the defendants.

22. The aforesaid conspiracy was effected and furthered by the defendants and co-conspirators herein as follows:

(a) Commencing in or about October 1964, and continuing to date, defendant SCHWEBEL has arbitrarily, and despite clear proof in support thereof, rejected all claims by TEXTURA concerning the inferior quality of fiber glass decorative fabrics sold by said defendant to TEXTURA; and has likewise refused to make any price adjustments or allow credits therefor, or even to accept return of the defective fabrics; and has thus discriminated against TEXTURA and in favor of other competing customers of said defendant.

(b) By in or about February 1966, TEXTURA had accumulated losses, by reason of such purchases of defective fabrics from defendant CLARK-SCHWEBEL and said defendant's refusal to make adjustments therefor, in an amount of at least $30,000.00. Defendant CLARK-SCHWEBEL continued to reject TEXTURA'S claims and

TEXTURA was compelled to take a credit for $30,000.00 against invoices payable to CLARK-SCHWEBEL.

(c) Defendant CLARK-SCHWEBEL thereupon, threatened reprisals and, on or about June 9, 1966, invoked an arbitration clause contained as a standard term in its sales contracts. Instead, however, of submitting TEXTURA'S aforesaid claims to arbitration, defendant CLARK-SCHWEBEL sought to intimidate and threaten TEXTURA by asserting a claim against TEXTURA in the amount of $92,234.20, which amount was greatly inflated not only by the aforesaid $30,000.00 but by claims for unwoven fiber glass and amounts not then due.

(d) Pursuant to and in furtherance of the aforesaid conspiracy between the defendants herein, defendant BURLINGTON, in or about July 1966, threatened to restrict TEXTURA'S credit unless TEXTURA settled the dispute with defendant CLARK-SCHWEBEL. BURLINGTON also demanded a personal guarantee of TEXTURA'S debts from plaintiff POWRIE. Simultaneously, defendant STEVENS also threatened to restrict TEXTURA'S credit and likewise demanded a personal guarantee from plaintiff POWRIE.

(e) Thereafter, in or about July 1966, pursuant to and in furtherance of the aforesaid conspiracy, all

the defendants refused to extend any credit whatsoever to TEXTURA and required that all TEXTURA'S purchases from them of fiber glass decorative products be made on a C.O.D. basis.

(f) Pursuant to and in furtherance of the aforesaid conspiracy, defendant BURLINGTON also halted deliveries of fabrics to TEXTURA under contracts already in process.

(g) Pursuant to and in furtherance of the aforesaid conspiracy, defendant CLARK-SCHWEBEL, upon information and belief, conspired with and induced the co-conspirator, DOMMERICH, to cancel its factoring arrangements with TEXTURA. DOMMERICH served notice of such cancellation upon TEXTURA on or about August 10, 1966, effective October 10, 1966.

(h) Thus coerced by the concerted actions of the defendants and co-conspirators, TEXTURA had no alternative but to settle the dispute with defendant CLARK-SCHWEBEL, which it did on or about September 26, 1966, on terms which were highly unfavorable and punitive to TEXTURA.

23. Defendants nevertheless persisted in their conspiracy and acted in concert to coerce and penalize TEXTURA and to injure and destroy TEXTURA'S business. Pursuant

thereto and in furtherance thereof:

(a) Defendants have continued to require TEXTURA to pay cash for all purchases, discriminating against TEXTURA in favor of other competitive customers of defendants and exhausting TEXTURA'S working capital.

(b) Defendant BURLINGTON has failed and refused to deliver large quantities of the most important fiber glass decorative fabric lines on order from it by TEXTURA.

(c) Defendant BURLINGTON has nevertheless sold a large quantity of the most important such fabric line to a competitor of TEXTURA.

24. All the aforesaid acts and conduct of the defendants herein constituted and continue to constitute unlawful conspiracy to eliminate competition, to coerce and discriminate against TEXTURA and to injure and destroy its business, all in unreasonable restraint of trade and commerce in fiber glass decorative fabrics among the several States, in violation of

Section 1 of the Sherman Act (15 U.S.C.A. §1).

25. All the aforesaid acts and conduct of the defendants herein have constituted and continue to constitute an illegal monopolization, attempt to monopolize and combination and conspiracy to monopolize a part of the trade and commerce in fiber glass decorative fabrics among the several States, in violation of Section 2 of the Sherman Act (15 U.S.C.A. §2).

26. As a direct and proximate result of the aforesaid unlawful acts and conduct of the defendants, TEXTURA has been injured in its business and property and has suffered and will continue to suffer great monetary damage through loss of sales and profits, goodwill and actual and potential customers, and the entire business of TEXTURA has been effectively destroyed.

27. As a result of the aforesaid unlawful acts and conduct of the defendants, purchasers of fiber glass decorative fabric draperies and the public at large have suffered and will continue to suffer grave injury and damage in terms of the price and quality thereof, and through the loss of the benefits that flow from free and unrestrained trade, commerce and competition.

28. TEXTURA has been and will continue to be

damaged by reason of the aforesaid unlawful acts of the defendants in the amount of not less than $2,075,000.00. Under Section 4 of the Clayton Act (15 U.S.C.A. §15) TEXTURA is entitled to recover from defendants threefold the damages sustained by TEXTURA, and the costs of this suit, including a reasonable attorney's fee.

29. The aforesaid unlawful acts and conduct of the defendants have already virtually destroyed TEXTURA'S business and property, and are a continuing and immediate threat to its existence. Unless defendants are enjoined and restrained from continuing their wrongful practices, TEXTURA will suffer irreparable and irremedial damage for which it has no adequate remedy at law.

AS AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF TEXTURA ALLEGES:

30. Repeats and realleges each and every allegation contained in Paragraphs "15" through "23" hereof, inclusive, with the same force and effect as if herein fully repeated.

31. The aforesaid acts and conduct of defendant CLARK-SCHWEBEL in refusing to make adjustments for inferior

quality of fiber glass decorative fabrics purchased from it by TEXTURA have constituted and continue to constitute unlawful discrimination by said defendant against TEXTURA and in favor of other competing customers of said defendant, in violation of Sections 2(a) and (e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. §§13(a) and (e)).

32. The aforesaid unlawful acts and conduct of each of the defendants in refusing to extend credit on TEXTURA'S purchases from them of fiber glass decorative fabrics on the same terms accorded to other competing customers of said defendants have constituted and continue to constitute unlawful discrimination by each of said defendants against TEXTURA and in favor of said other customers, in violation of Sections 2(a) and (e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. §§13 (a) and (e)).

33. Repeats and realleges each and every allegation contained in Paragraphs "26" through "29" hereof, inclusive, with the same force and effect as if herein fully repeated.

AS AND FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF FENESTRA ALLEGES:

34. Repeats and realleges each and every allegation contained in Paragraphs "15" through "25" hereof, inclusive, with the same force and effect as if herein fully repeated.

35. The aforesaid unlawful acts and conduct of defendants were and are also directed against FENESTRA, which undertakes and performs contracts for direct installation of fiber glass decorative fabric draperies in large commercial buildings and relies upon TEXTURA for the materials and labor therefor.

36. As a direct and proximate result of the aforesaid unlawful acts and conduct of the defendants, FENESTRA has been injured in its business and property and has suffered and will continue to suffer great monetary damage through inability to fulfill contracts and orders on hand and loss of sales and profits, goodwill and actual and potential customers.

37. Repeats and realleges each and every allegation contained in Paragraph "27" hereof with the same force and effect as if herein fully repeated.

38. FENESTRA has been and will continue to be damaged by reason of the aforesaid unlawful acts and conduct of the defendan the amount of not less than $500,000.00. Under Section 4 of the Clayton Act (15 U.S.C.A. §15) FENESTRA is entitled to recover from defendants threefold the damages sustained by FENESTRA, and the costs of this suit, including a reasonable attorney's fee.

39. The aforesaid unlawful acts and conduct of defendants have seriously injured FENESTRA'S business and property and are a continuing and immediate threat to its existence. Unless defendants are enjoined and restrained from continuing their wrongful practices, FENESTRA will suffer irreparable and irremedial damage for which it has no adequate remedy at law.

AS AND FOR A FOURTH, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF POURIE ALLEGES:

40. Repeats and realleges each and every alle-

ation contained in Paragraphs "15" through "25" hereof, inclusive, with the same force and effect as if herein fully repeated.

41. The aforesaid unlawful acts and conduct of defendants were and are also directed against plaintiff POWRIE, who is the President and majority stockholder of plaintiffs TEXTURA and FENESTRA, and who has pledged his own property as security for loans to TEXTURA by the co-conspirator, DOMMERICH, and personally guaranteed performance bonds for TEXTURA.

42. As a direct and proximate result of the aforesaid unlawful acts of the defendants, POWRIE has been injured in his business and property and has suffered and will continue to suffer great monetary damage through loss of salary and other benefits, loss of his aforesaid property and liability on the aforesaid performance bonds.

43. Repeats and realleges each and every allegation contained in Paragraph "27" hereof with the same force and effect as if herein fully repeated.

44. POWRIE has been and will continue to be damaged by reason of the aforesaid unlawful acts and conduct of the defendants in the amount of not less than $575,000.00. Under Section 4 of the Clayton Act (15 U.S.C.A. §15) POWRIE is entitled

to recover from defendants threefold the damages sustained by POWRIE, and the costs of this suit, including a reasonable attorney's fee.

45. The aforesaid unlawful acts and conduct of defendants have seriously injured POWRIE'S business and property, and are a continuing and immediate threat to his ability to engage and continue in business. Unless defendants are enjoined and restrained from continuing their wrongful practices, POWRIE will suffer irreparable and irremedial damage for which he has no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment against defendants as follows:

I. A. On the first and second causes of action, plaintiff TEXTURA demands treble damages against defendants in the amount of $6,225,000.00.

B. On the third cause of action, plain-

tiff FENESTRA demands treble damages against defendants in the amount of $1,500,000.00.

C. On the fourth cause of action, plaintiff POWRIE demands treble damages against defendants in the amount of $1,725,000.00.

II. Permanently enjoining and restraining defendants and each of them, their directors, officers, employees and agents, and all other persons acting in concert or participating with them, from continuing the conspiracies, combinations, agreements and other unlawful acts and practices alleged herein.

III. A. Granting plaintiffs reasonable attorneys' fees, interest, and the costs and disbursements of this action.

B. Granting plaintiffs such other and

further legal or equitable relief as to the Court may seem just and proper.

REGAN GOLDFARB POWELL & QUINN

By _____
A Member of the Firm
Attorneys for Plaintiffs
230 Park Avenue
New York, New York 10017
OR 9-8181

Plaintiffs, pursuant to Rule 38 of the Federal Rules of Civil Procedure, hereby demand a trial by jury of this action.

REGAN GOLDFARB POWELL & QUINN

By _____
A Member of the Firm
Attorneys for Plaintiffs
230 Park Avenue
New York, New York 10017
OR 9-8181

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

TEXTURA LTD., FENESTRA FABRICS, INC. and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants.

66 Civ. 4230

ANSWER

- x

Defendant, CLARK-SCHWEBEL FIBER GLASS CORPORATION, for its answer to the complaint herein:

1. Denies each and every allegation contained in paragraphs of the complaint numbered 1, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs of the complaint numbered 5, 6, 7, 9, 10 and 11.

3. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of the complaint numbered 15, except that defendant, Clark-Schwebel Fiber Glass Corporation, admits that Textura has made purchases of fiber glass decorative fabrics from defendant Clark-Schwebel Fiber Glass Corporation.

4. Denies each and every allegation contained in paragraph of the complaint numbered 16, except admits that Clark-Schwebel Fiber Glass Corporation extended credit to

Textura and that Textura is still indebted to Clark-Schwebel Fiber Glass Corporation in an amount exceeding $70,000.

5. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of the complaint numbered 17, except admits that Clark-Schwebel Fiber Glass Corporation at all times accepted returns of inferior quality material from purchasers or made adjustments in price therefor through credits or otherwise.

WHITE & CASE

/s/ Haliburton Fales, 2d

By_____
A Member of the Firm

Attorneys for Defendant
Clark-Schwebel Fiber Glass
Corporation
14 Wall Street
New York, New York 10005
REctor 2-1040

Filed
10:30 AM.
2/14/67
HAB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXTURA LTD., FENESTRA FABRICS, INC. and MALCOLM G. POWRIE, Plaintiffs,	66 Civ. 4230
-against-	ANSWER AND COUNTER-CLAIM OF DEFENDANT BURLINGTON INDUSTRIES, INC.
CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC., Defendants.	

Defendant, Burlington Industries, Inc., for its answer to the complaint herein:

First Defense

1. Denies the allegations of Paragraph 1, except admits that plaintiffs purport to bring this action under the antitrust laws specified.

2. Admits the allegations of Paragraph 2.

3. Denies the allegations of Paragraph 3, except admits that it maintains offices, transacts business, and is found within the Southern District of New York, and, upon information and belief, that defendants Clark-Schwebel Fiber Glass Corporation and J. P. Stevens & Company, Inc., transact business or are found within the Southern District of New York.

4. Admits the allegations of Paragraph 4, except denies that any of the plaintiffs is a person injured in its business or property by reason of anything forbidden in the antitrust laws.

5. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 5, except admits and avers that plaintiff Textura has at various times within the period covered by the allegations of the complaint been engaged, directly or indirectly, in the purchase of fiber glass decorative fabrics, their conversion into draperies and

the sale thereof for various uses in office, commercial, apartment, public or other buildings.

6.-8. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraphs 6, 7, and 8.

9. Admits the allegations of Paragraph 9.

10.-11. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraphs 10 and 11.

12.-14. Denies the allegations of Paragraphs 12, 13, and 14.

15. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 15, except admits and avers that during the period covered by the complaint, Textura has purchased or sought to purchase fiber glass decorative fabrics from the defendant Burlington.

16. Denies the allegations of Paragraph 16, except admits and avers that the defendant Burlington has at all times applied to Textura the same credit policies applicable to all purchasers and that Textura is still indebted to Burlington in a substantial amount.

17. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 17, except admits and avers that the defendant Burlington has at all times during the period covered by this complaint accepted returns of inferior quality material from Textura and other purchasers of decorative fiber glass fabrics and has taken due account thereof through credit adjustments or otherwise. Further answering, defendant Burlington avers that its practice and policy with regard to returns of inferior quality material was at no time modified or discriminatorily applied as to Textura or any of the plaintiffs herein.

18.-45. Denies the allegations of Paragraphs 18 to 45, inclusive.

Second Defense

The complaint, and each of the four separate and distinct causes of action alleged therein, fails to state a claim upon which relief can be granted.

WHEREFORE, having fully answered the complaint, defendant Burlington prays for judgment dismissing the complaint herein.

COUNTERCLAIM

The defendant Burlington Industries, Inc., for its counterclaim against Textura Ltd., avers:

1. Plaintiff, Textura Ltd., is a corporation organized and existing under the laws of the State of California, having its principal offices in the City of Los Angeles, State of California.

2. Defendant, Burlington Industries, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal offices in the City of Greensboro, State of North Carolina.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

4. During the period from on or about June 14, 1966, to on or about November 15, 1966, the defendant Burlington Industries, Inc., sold and delivered to the plaintiff Textura Ltd., on net thirty day terms, fiber glass decorative fabrics having an aggregate value in the amount of $16,659.27, for which plaintiff Textura Ltd., has failed to make payment as promised.

WHEREFORE, defendant Burlington Industries, Inc., prays for judgment against plaintiff for goods sold and delivered in the sum of $16,659.27, together with interest from the

dates on which payment was due, at the rate of 6 per cent per annum and its costs herein expended.

Dated: New York, New York
February 13, 1967

Robert P. Lynn
1430 Broadway
New York, New York 10018

Attorney for Defendant

BERGSON & BORKLAND
888 17th Street, N. W.
Washington, D. C. 20006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer and Counterclaim of Defendant Burlington Industries, Inc., was served upon John J. Galgay, Esquire, a member of the firm of Regan, Goldfarb, Powell & Quinn, attorneys for plaintiffs, by mailing a copy thereof to his office at 230 Park Avenue, New York, New York, 10017, this 13th day of February, 1967. I further certify that copies of the foregoing Answer and Counterclaim were served upon Haliburton Fales, II, Esquire, a member of the firm of White & Case, attorneys for defendant Clark-Schwebel, by mailing a copy thereof to his office at 14 Wall Street, New York, New York, 10005, and to Jay Topkis, Esquire, a member of the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for defendant J. P. Stevens & Company, Inc., by mailing a copy thereof to his office at 575 Madison Avenue, New York, New York, 10022.

Howard Adler, Jr.
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXTURA LTD., FENESTRA FABRICS, INC., and MALCOLM G. POWRIE, Plaintiffs, -against- CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J.P. STEVENS & COMPANY, INC., Defendants.	ANSWER AND COUNTERCLAIM OF DEFENDANT J. P. STEVENS & COMPANY, INC. 66 Civ. 4230

Defendant, J. P. STEVENS & COMPANY, INC. ("STEVENS") for its answer to the complaint herein:

1. Denies the allegations of paragraph 1, except admits that plaintiffs purport to bring this action under the antitrust laws specified therein.

2. Admits the allegations of paragraph 4, except denies that any of the plaintiffs is a person injured in its or his business or property by reason of anything forbidden by the antitrust laws.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5, except admits that at various times herein material plaintiff TEXTURA has been engaged, directly or indirectly, in the purchase of fiber glass decorative fabrics, their conversion into draperies, and the sale thereof for various uses in office, commercial, apartment, public and other buildings.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6 and 7.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11, except denies that DOMMERICH was or is a co-conspirator.

6. Denies the allegations of paragraphs 12 and 13.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15, except admits that throughout the period of the alleged conspiracy, plaintiff TEXTURA has purchased fiber glass decorative fabrics from STEVENS.

8. Admits the allegations of paragraph 16, except adds that in July 1966 and continuously thereafter until the commencement of this law suit STEVENS continued to extend credit to plaintiff TEXTURA on terms which were accorded to competing purchasers of fiber glass decorative fabrics.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17, except admits that at all times herein material and continuing until the commencement of this law suit STEVENS granted plaintiff TEXTURA price reductions and credits on the same terms accorded to competing purchasers.

10. Denies the allegations of paragraphs 18 through 45.

WHEREFORE, STEVENS demands judgment dismissing the complaint herein.

COUNTERCLAIM

STEVENS, for a counterclaim against TEXTURA LTD., alleges:

1. On information and belief, plaintiff TEXTURA is a corporation incorporated under the laws of the State of California, having its principal offices in the City of Los Angeles, State of California.

2. STEVENS is a corporation incorporated under the laws of the State of Delaware, with offices for the transaction of business in the City, County and State of New York.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

4. During the period from on or about May 3, 1966 to on or about February 7, 1967, STEVENS sold and delivered to plaintiff TEXTURA, on net sixty-day terms, fiber glass decorative fabrics having an aggregate value in the amount of $17,156.60, for which plaintiff TEXTURA has failed and refused to make payment as promised, although STEVENS has duly demanded such payment.

WHEREFORE, STEVENS demands judgment against plaintiff TEXTURA for goods sold and delivered in the sum of $17,156.60, together with interest from the dates on which payment was due.

Dated: New York, New York
June 26, 1967

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Defendant
J.P. STEVENS & COMPANY, INC.
575 Madison Avenue
New York, N.Y. 10022
MU 8-5600

Sir:

Please take notice that the within is a (*certified*) true copy of a duly made and entered in the within entitled and filed in the office of the Clerk of on the day of 19 .

Dated, New York, 19 .

Yours, etc.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Attorneys for

Office and Post Office Address

575 Madison Avenue

Borough of Manhattan New York, N. Y. 10022

To , Esq.,

Attorney for

Sir:

Please take notice that an order of which the within is a true copy will be presented for settlement and entry herein to Mr. Justice at of this Court at in the Borough of City of New York, on the day of 19 at M

Dated, New York, 19 .

Yours, etc.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Attorneys for

Office and Post Office Address

575 Madison Avenue

Borough of Manhattan New York, N. Y. 10022

To , Esq.,

Attorney for

Index No. 66 Civ. 4230 Year

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXTURA LTD., FENESTRA FABRICS, INC., and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC., and J.P. STEVENS & COMPANY, INC.,

Defendants

ANSWER AND COUNTERCLAIM OF DEFENDANT J.P. STEVENS & COMPANY, INC.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Attorneys for Defendant

Office and Post Office Address

575 Madison Avenue

Borough of Manhattan New York, N. Y. 10022

MU 8-5600

Service of a copy of the within

is hereby admitted

Dated, New York, 19

Attorney for

35

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that
deponent is the in the within action; that deponent has
read the foregoing and knows the contents thereof; that
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.
Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
of the corporation
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

TEXTURA LTD., FENESTRA FABRICS, INC., and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants.

REPLY TO COUNTERCLAIM OF DEFENDANT J.P.STEVENS & CO., INC.

66 Civ. 4230

- -X

Plaintiff, TEXTURA, LTD. ("TEXTURA"), by its attorneys, Regan Goldfarb Powell & Quinn, for its reply to the counterclaim of defendant, J. P. STEVENS & CO., INC. ("STEVENS") herein:

1. Denies each and every allegation contained in Paragraph 3 of the counterclaim.

2. Denies each and every allegation contained in Paragraph 4 of the counterclaim, except admits that STEVENS delivered fiber glass decorative fabrics to TEXTURA during the period from on or about May 3, 1966 to on or about February 7, 1967 and has demanded payment therefor, and refers to the relevant books and records of TEXTURA and STEVENS for the quantity and value thereof and the amounts paid and/or alleged to be owing by TEXTURA.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

3. On or about February 17, 1967, an involuntary petition in bankruptcy was filed against TEXTURA in the United States District Court for the Central District of California, and, upon information and belief, said petition was approved by an order of said Court which restrains the institution and prosecution of suits against TEXTURA, including the within counterclaim; and this Court is without jurisdiction of the subject-matter of said counterclaim.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

4. Any alleged failure by TEXTURA to pay for fiber glass decorative fabrics delivered to it by STEVENS has been directly caused by the unlawful conspiracy and acts of STEVENS and the other defendants and co-conspirators herein, destroying TEXTURA's business, as alleged in the complaint, and the within counterclaim may not be maintained thereon.

Dated: New York, New York
July 18, 1967

REGAN GOLDFARB POWELL & QUINN

By John J. Galgay
A Member of the Firm
Attorneys for Plaintiffs
445 Park Avenue
New York, N.Y. 10022
421 - 8800

NOTICE OF ENTRY

Sir :- Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

REGAN GOLDFARB POWELL & QUINN

Attorneys for

Office and Post Office Address

445 Park Avenue

Borough of Manhattan **New York, N. Y. 10022**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir :- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

REGAN GOLDFARB POWELL & QUINN

Attorneys for

Office and Post Office Address

445 Park Avenue

Borough of Manhattan **New York, N. Y. 10022**

To

Attorney(s) for

Index No. CIV. 4230 Year 1968

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXTURA LTD., FENESTRA FABRICS, INC., and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants.

REPLY TO COUNTERCLAIM OF DEFENDANT J. P. STEVENS & CO., INC.

REGAN GOLDFARB POWELL & QUINN

Attorneys for Plaintiffs

Office and Post Office Address, Telephone

445 Park Avenue

Borough of Manhattan **New York, N. Y. 10022**

(212) 421-8800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

1500-©1963, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that
deponent is the in the within action; that deponent has
read the foregoing and knows the contents thereof; that
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
of the corporation
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No
deponent served the within
upon
the being, by delivering a true copy thereof to him personally. Deponent knew the
person served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

TEXTURA LTD., FENESTRA FABRICS, INC., and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J.P.STEVENS & COMPANY, INC.,

Defendants.

REPLY TO COUNTERCLAIM OF DEFENDANT BURLINGTON INDUSTRIES, INC.

66 Civ. 4230

- X

Plaintiff, TEXTURA, LTD. ("TEXTURA"), by its attorneys, Regan Goldfarb Powell & Quinn, for its reply to the counterclaim of defendant, BURLINGTON INDUSTRIES, INC. ("BURLINGTON"), herein:

1. Denies each and every allegation contained in Paragraph 3 of the counterclaim.

2. Denies each and every allegation contained in Paragraph 4 of the counterclaim, except admits that BURLINGTON delivered fiber glass decorative fabrics to TEXTURA during the period from on or about June 14, 1966 to on or about November 15, 1966 and has demanded payment therefor, and refers to the relevant books and records of TEXTURA and BURLINGTON for the quantity and value thereof, and the amounts paid and/or alleged to be owing by TEXTURA.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

3. On or about February 17, 1967, an involuntary petition in bankruptcy was filed against TEXTURA in the United States District Court for the Central District of California, and, upon information and belief, said petition was approved by an order of said Court which restrains the institution and prosecution of suits against TEXTURA, including the within counterclaim; and this Court is without jurisdiction of the subject-matter of said counterclaim.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

4. Any alleged failure by TEXTURA to pay for fiber glass decorative fabrics delivered to it by BURLINGTON has been directly caused by the unlawful conspiracy and acts of BURLINGTON and the other defendants and co-conspirators herein, destroying TEXTURA's business, as alleged in the complaint, and the within counterclaim may not be maintained thereon.

Dated: New York, New York
July 18, 1967

REGAN GOLDFARB POWELL & QUINN

By _____
A Member of the Firm
Attorneys for Plaintiffs
445 Park Avenue
New York, N.Y. 10022
421 - 8800

NOTICE OF ENTRY

Sir :- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

REGAN GOLDFARB POWELL & QUINN

Attorneys for

Office and Post Office Address

445 Park Avenue

Borough of Manhattan New York, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir :- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

REGAN GOLDFARB POWELL & QUINN

Attorneys for

Office and Post Office Address

445 Park Avenue

Borough of Manhattan New York, N. Y. 10022

To

Attorney(s) for

Index No. Civ. 4230 Year 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEXTURA LTD., FENESTRA FABRICS, INC., and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J.P. STEVENS & COMPANY, INC.,

Defendants.

REPLY TO COUNTERCLAIM OF DEFENDANT BURLINGTON INDUSTRIES, INC.

REGAN GOLDFARB POWELL & QUINN

Attorneys for Plaintiffs

Office and Post Office Address, Telephone

445 Park Avenue

Borough of Manhattan New York, N. Y. 10022

(212) 421-8800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

1500-©1963, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

43

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No. deponent served upon the herein, by delivering a true copy ther[illegible] Deponent knew the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. and MALCOLM G. POWRIE, Plaintiffs, -against- CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC., Defendants.	AMENDED COMPLAINT Civil Action No. 66 Civ. 4230

Plaintiffs CARLYLE MICHELMAN, TRUSTEE OF TEXTURA LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. and MALCOLM G. POWRIE, by their attorneys, REGAN GOLDFARB POWELL & QUINN, for their complaint herein allege as follows:

1. This action is brought under Section 4 of the Act of Congress of October 15, 1914 commonly known as the Clayton Act (15 U.S.C.A. §15), as amended and supplemented, to recover threefold the damages sustained by plaintiffs in their business

EXHIBIT A

and property, and for injunctive relief, by reason of violations by defendants of Sections 1 and 2 of the Act of Congress of July 2, 1890 commonly known as the Sherman Act (15 U.S.C.A. §§1 and 2), as amended and supplemented, and of Sections 2(a) and (e) of the aforesaid Clayton Act as amended by the Act of Congress of June 19, 1936 commonly known as the Robinson-Patman Act (15 U.S.C.A. §§13 (a) and (e)).

2. The parties hereto and the transactions herein complained of or referred to were and are in interstate commerce.

3. Each of the defendants herein is an inhabitant of, or resides, is found, transacts business or has an agent in the Southern District of New York.

4. Venue of this action is proper by virtue of Sections 4 and 12 of the aforesaid Clayton Act (15 U.S.C.A. §§15 and 22).

5. TEXTURA LTD. (hereinafter called "TEXTURA") is and has been, since March 9, 1962, at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of

California, with its principal offices in the City of Los Angeles, State of California. At all pertinent times herein TEXTURA has been engaged, directly or through its former affiliate and predecessor in interest, GLASS FABRICS, INC., in the purchase of fiber glass decorative fabrics, their conversion into draperies and the sale thereof for various uses in office, commercial, apartment, public and other buildings and in the purchase, conversion and sale of fiber glass industrial fabrics. GLASS FABRICS, INC., a California corporation since April 18, 1954, was dissolved in December 1964, at which time its assets were acquired by TEXTURA. In or about April, 1967, CARLYLE MICHELMAN was duly appointed Trustee of TEXTURA in its pending Bankruptcy Proceeding, in the United States District Court, Central District of California, bankruptcy proceeding number 8865-PH.

6. Plaintiff FENESTRA FABRICS, INC. (hereinafter called "FENESTRA") is and has been since January 4, 1960, a corporation organized and existing under the laws of the State of California, with its principal offices in the City of Los Angeles, California. Until December 1964, FENESTRA was a wholly-owned subsidiary of GLASS FABRICS, INC., and thereafter of TEXTURA, until August 1, 1966, at which time its stock was acquired by the stockholders of TEXTURA. At all pertinent times herein, FENESTRA

has undertaken the direct sale and installation of fiber glass draperies and fiber glass industrial fabrics in large commercial buildings with materials and labor supplied by TEXTURA and/or GLASS FABRICS, INC.

7. Plaintiff MALCOLM G. POWRIE (hereinafter called "POWRIE") is and was at all times hereinafter mentioned a citizen of the United States and resident of the State of California. POWRIE was formerly the President of GLASS FABRICS, INC., and is and has been President of TEXTURA and FENESTRA since their organization. POWRIE has held a majority of the stock of TEXTURA and FENESTRA since in or about 1963 and August 1, 1966, respectively.

8. Upon information and belief, defendant CLARK-SCHWEBEL FIBER GLASS CORPORATION (hereinafter called "CLARK-SCHWEBEL") is and has been since 1961 a corporation organized and existing under the laws of the State of New York, with its principal offices in the City, County and State of New York, and engaged in the business, among other things, of weaving and selling fiber glass decorative fabrics and fiber glass industrial fabrics.

9. Upon information and belief, defendant BURLINGTON

INDUSTRIES, INC. (hereinafter called "BURLINGTON") is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the City, County and State of New York and engaged in the business of selling textiles and allied products. Upon information and belief, BURLINGTON entered the business of weaving and selling fiber glass decorative fabrics and fiber glass industrial fabrics in or about February 1956 by acquiring HESS, GOLDSMITH & COMPANY, INC., a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the City, County and State of New York, which was engaged in such business; and has continued thereafter in such business by operating HESS, GOLDSMITH & COMPANY, INC. as a wholly-owned subsidiary, until in or about September 1962, and subsequently as a division of BURLINGTON. Whenever reference is made herein to defendant BURLINGTON, such reference shall be deemed to include HESS, GOLDSMITH & COMPANY, INC.

10. Upon information and belief, defendant J. P. STEVENS & COMPANY, INC. (hereinafter called "STEVENS") is and was

at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the City, County and State of New York, and engaged in the business of weaving and selling fiber glass decorative fabrics and fiber glass industrial fabrics.

11. Upon information and belief, L. F. DOMMERICH & CO., INC. (hereinafter called "DOMMERICH") is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of New York with its principal offices in the City, County and State of New York, and engaged in business, among other things, as a factor. From in or about 1962 until October 10, 1966, DOMMERICH was employed under contract as a factor by TEXTURA and also made loans and advances of money on occasion to TEXTURA. DOMMERICH is not made a defendant herein, but is hereby named as a co-conspirator.

12. The following officers and employees of the corporate defendants and of DOMMERICH are hereby named as co-conspirators:

INDIVIDUAL	CORPORATION	CAPACITY
J. P. SCHWEBEL	CLARK-SCHWEBEL	President
RAYMOND P. NORDHEIM	CLARK-SCHWEBEL	Vice-President
HARRY T. GOLDSMITH	BURLINGTON	Former Vice-President and President
WILLIAM COLTON	BURLINGTON	President
ERVIN A. SCHUTZ	BURLINGTON	Vice-President
CHARLES A. KELLY	BURLINGTON	Asst. to Mr. SCHUTZ
JACK G. CANN	BURLINGTON	Credit Dept.
IRWIN J. GUSMAN	STEVENS	Manager, Industrial Fiber Glass Dept.
ROBERT A. KNISEL	STEVENS	Credit Dept.
LOUIS MOSKOWITZ	DOMMERICH	President.

13. The acts charged herein to have been done by the defendant and co-conspirator corporations were authorized, ordered, or done by the officers, agents, employees or representatives of such corporations while actively engaged in the management, direction or control of their affairs, including the individuals named as co-conspirators herein.

14. All of the foregoing allegations are hereby incorporated by reference in each of the causes of action asserted herein as if fully set forth therein.

AS AND FOR A FIRST, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF, CARLYLE MICHELMAN TRUSTEE OF TEXTURA LTD., IN BANKRUPTCY PROCEEDINGS, ALLEGES:

15. At all times mentioned herein, TEXTURA (and/or its former affiliate and predecessor in interest, GLASS FABRICS, INC.) has purchased or sought to purchase all or substantially all of its requirements of fiber glass decorative fabrics from the defendants herein, commencing at least as early as 1956 in the case of defendants BURLINGTON and STEVENS, and in or about June 1963 in the case of defendant CLARK-SCHWEBEL.

16. With respect to such purchases, the defendants, until in or about July 1966, extended credit to TEXTURA on terms which were accorded to competing purchasers of fiber glass decorative fabrics.

17. Because of quality control problems it has been necessary in the fiber glass decorative fabric industry for the

weavers, including the defendants herein, to accept returns of inferior quality material from purchasers or to make adjustments in price therefor, through credits or otherwise. Until in or about October 1964, the defendants herein followed this practice with TEXTURA, as with competing purchasers, and made price reductions or allowed credits for all material of inferior quality purchased from them by TEXTURA.

18. Since in or about at least 1964, the exact date being unknown to plaintiff, the defendants herein have been engaged in an unlawful and continuing combination and conspiracy (hereinafter called "the conspiracy") in unreasonable restraint of interstate trade and commerce in fiber glass decorative fabrics, in violation of Section 1 of the Sherman Act.

19. The aforesaid combination and conspiracy has consisted of continuing agreements, understandings and concerted actions by and between the defendants to restrain, suppress, avoid and eliminate price competition in the sale of fiber glass decorative fabrics by fixing, stabilizing and maintaining prices and terms and conditions, including the extension of credit and the

adjustment of quality claims, for the sale of said fabrics to customers.

20. In furtherance of the aforesaid conspiracy, commencing in or about October 1964, defendant CLARK-SCHWEBEL determined to coerce, force and induce TEXTURA to cease and desist from submitting and pursuing claims with respect to the inferior quality of fiber glass decorative fabrics purchased by TEXTURA from said defendant, and obtaining price adjustments or credits therefor, or failing in that, to injure and destroy TEXTURA'S business and eliminate TEXTURA from competition with other customers of said defendant.

21. Thereafter, in furtherance of the conspiracy, the defendants herein and the co-conspirators entered into various agreements and took concerted actions, the aim, object and purpose of which was and is to coerce, force and induce TEXTURA to cease and desist from submitting and pursuing the aforesaid claims with respect to inferior quality, or failing in that, to injure, and destroy TEXTURA'S business and eliminate TEXTURA from competition with other customers of the defendants.

22. The aforesaid conspiracy was effected and furthered by the defendants and co-conspirators herein as follows:

(a) Commencing in or about October 1964, and continuing to date, defendant CLARK-SCHWEBEL has arbitrarily, and despite clear proof in support thereof, rejected all claims by TEXTURA concerning the inferior quality of fiber glass decorative fabrics sold by said defendant to TEXTURA; and has likewise refused to make any price adjustments or allow credits therefor, or even to accept return of the defective fabrics; and has thus discriminated against TEXTURA and in favor of other competing customers of said defendant.

(b) By in or about February 1966, TEXTURA had accumulated losses, by reason of such purchases of defective fabrics from defendant CLARK-SCHWEBEL and said defendant's refusal to make adjustments therefor, in an amount of at least $30,000.00. Defendant CLARK-SCHWEBEL continued to reject TEXTURA'S claims and TEXTURA was compelled to take a credit for $30,000.00 against invoices payable to CLARK-SCHWEBEL.

(c) Defendant CLARK-SCHWEBEL thereupon, threatened reprisals and, on or about June 9, 1966, invoked an arbitration clause contained as a standard term in its sales contracts. Instead, however, of submitting TEXTURA'S aforesaid claims to arbitration, defendant CLARK-SCHWEBEL sought to intimidate and threaten TEXTURA by asserting a claim against TEXTURA in the amount of $92,234.20, which amount was greatly inflated not only by the aforesaid $30,000.00 but by claims for unwoven fiber glass and amounts not then due.

(d) Pursuant to and in furtherance of the aforesaid conspiracy between the defendants herein, defendant BURLINGTON, in or about July 1966, threatened to restrict TEXTURA'S credit unless TEXTURA settled the dispute with defendant CLARK-SCHWEBEL. BURLINGTON also demanded a personal guarantee of TEXTURA'S debts from plaintiff PCWRIE. Simultaneously, defendant STEVENS also threatened to restrict TEXTURA'S credit and likewise demanded a personal guarantee from plaintiff PCWRIE.

(e) Thereafter, in or about July 1966, pursuant to and in furtherance of the aforesaid conspiracy, all the defen-

dants refused to extend any credit whatsoever to TEXTURA and required that all TEXTURA'S purchases from them of fiber glass decorative products be made on a C.O.D. basis.

(f) Pursuant to and in furtherance of the aforesaid conspiracy, defendant BURLINGTON also halted deliveries of fabrics to TEXTURA under contracts already in process.

(g) Pursuant to and in furtherance of the aforesaid conspiracy, defendant CLARK-SCHWEBEL, upon information and belief, conspired with and induced the co-conspirator, DOMMERICH, to cancel its factoring arrangements with TEXTURA. DOMMERICH served notice of such cancellation upon TEXTURA on or about August 10, 1966, effective October 10, 1966.

(h) Thus coerced by the concerted actions of the defendants and co-conspirators, TEXTURA had no alternative but to settle the dispute with defendant CLARK-SCHWEBEL, which it did on or about September 26, 1966, on terms which were highly unfavorable and punitive to TEXTURA.

23. Defendants nevertheless persisted in their conspiracy and acted in concert to coerce and penalize TEXTURA and to injure and destroy TEXTURA'S business. Pursuant thereto and in furtherance thereof:

(a) Defendants have continued to require TEXTURA to pay cash for all purchases, discriminating against TEXTURA in favor of other competitive customers of defendants and exhausting TEXTURA'S working capital.

(b) Defendant BURLINGTON has failed and refused to deliver large quantities of the most important fiber glass decorative fabric lines on order from it by TEXTURA.

(c) Defendant BURLINGTON has nevertheless sold a large quantity of the most important such fabric line to a competitor of TEXTURA.

24. All the aforesaid acts and conduct of the defendants herein constituted unlawful conspiracy to eliminate competition, to coerce and discriminate against TEXTURA and to injure and destroy its business, all in unreasonable restraint of trade and commerce in fiber glass decorative fabrics among the several

States, in violation of Section 1 of the Sherman Act (15 U.S.C.A. §1).

25. All the aforesaid acts and conduct of the defendants herein have constituted and continue to constitute an illegal monopolization, attempt to monopolize and combination and conspiracy to monopolize a part of the trade and commerce in fiber glass decorative fabrics among the several states, in violation of Section 2 of the Sherman Act (15 U.S.C.A. §2).

26. As a direct and proximate result of the aforesaid unlawful acts and conduct of the defendants, TEXTURA has been injured in its business and property, has suffered great monetary damage through loss of sales and profits, goodwill and actual and potential customers, the entire business of TEXTURA has been effectively destroyed and TEXTURA has involuntarily been put into bankruptcy.

27. As a result of the aforesaid unlawful acts and conduct of the defendants, purchasers of fiber glass decorative fabric draperies and the public at large have suffered and will continue to suffer grave injury and damage in terms of the price and quality thereof, and through the loss of the benefits that flow from free and unrestrained trade, commerce and competition.

28. TEXTURA has been and will continue to be damaged by reason of the aforesaid unlawful acts of the defendants in the amount of not less than $2,075.000.00. Under Section 4 of the Clayton Act (15 U.S.C.A. §15) plaintiff CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, is entitled to recover from defendants threefold the damages sustained by TEXTURA, and the costs of this suit, including a reasonable attorney's fee.

29. The aforesaid unlawful acts and conduct of the defendants have already virtually destroyed TEXTURA'S business and property, and are a continuing and immediate threat to its existence. Unless defendants are enjoined and restrained from continuing their wrongful practices, TEXTURA will suffer irreparable and irremedial damage for which it has no adequate remedy at law.

AS AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF, CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, ALLEGES:

30. Repeats and realleges each and every allegation contained in Paragraphs "15" through "23" hereof, inclusive, with the same force and effect as if herein fully repeated.

31. The aforesaid acts and conduct of defendant CLARK-SCHWEBEL in refusing to make adjustments for inferior quality of fiber glass decorative fabrics purchased from it by TEXTURA

have constituted unlawful discrimination by said defendant against TEXTURA and in favor of other competing customers of said defendant, in violation of Sections 2(a) and (e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. §§13(a) and (e)).

32. The aforesaid unlawful acts and conduct of each of the defendants in refusing to extend credit on TEXTURA'S purchases from them of fiber glass decorative fabrics on the same terms accorded to other competing customers of said defendants have constituted and continue to constitute unlawful discrimination by each of said defendants against TEXTURA and in favor of said other customers, in violation of Sections 2(a) and (e) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. §§13 (a) and (e)).

33. Repeats and realleges each and every allegation contained in Paragraphs "26" through "29" hereof, inclusive, with the same force and effect as if herein fully repeated.

AS AND FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF, CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, ALLEGES:

34. At all times mentioned herein, TEXTURA (and/or

its former affiliate and predecessor in interest, GLASS FABRICS, INC.) has purchased or sought to purchase all or substantially all of its requirements of fiber glass industrial fabrics from the defendants herein, commencing at least as early as 1956.

35. Beginning at least as early as 1956 the defendants BURLINGTON and STEVENS, and at various times thereafter, the defendant CLARK-SCHWEBEL and co-conspirators, HARRY T. GOLDSMITH, (BURLINGTON, former Vice President and President), J. P. SCHWEBEL (CLARK-SCHWEBEL, President) and IRWIN J. GUSMAN (STEVENS, Manager Industrial Fiber Glass Department), among others, and continuing thereafter until at least October 9, 1964, the exact date being unknown, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the interstate trade and commerce in fiber glass industrial fabrics, in violation of Section 1 of the Sherman Act (15 U.S.C.A. §1).

36. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action, between and among the defendants and the co-conspirators, to restrain, suppress, avoid, and eliminate price competi-

tion in the sale of fiber glass industrial fabrics.

37. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do, including, among other things, the following:

(a) Agreed to fix, maintain, adhere to, stabilize and increase prices and terms and conditions for the sale of fiber glass industrial fabrics to customers.

(b) Held secret meetings on more than one occasion at the following locations in New York City:

(1) In a restaurant at the St. Moritz Hotel;

(2) At the Brookshire Hotel;

(3) At the Murray Apartments;

(4) At Bryant Park;

(5) At Cheers Restaurant;

(6) At the French Shack Restaurant;

(7) At the Town House, and at various offices of the corporate defendants and various other hotels, restaurants and locations in New York City.

(c) Used a secret code or veiled terminology, in writing, or orally, to camouflauge price-fixing agreements and communications.

38. Plaintiffs had no knowledge of the said combination and conspiracy, or of any facts which might have lead to the discovery thereof until October 9, 1964, and they could first have become aware of the unlawful conspiracy as the result of the filing of an information against the defendants herein and others in this district on October 9, 1964 (United States v. Burlington Industries, Inc., et al, Criminal Action No. 64 CR. 871). Plaintiffs could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by the defendants herein.

39. The unlawful combination and conspiracy hereinbefore charged has had the following effects among others:

(a) Prices of fiber glass industrial fabrics throughout the United States and to TEXTURA have been artificially raised, fixed and stabilized at high and non-competitive levels.

(b) Price competition in the sale of fiber glass industrial fabrics throughout the United States has been restrained, suppressed and eliminated.

(c) Purchasers of fiber glass industrial fabrics, including TEXTURA, throughout the United States have been deprived of the benefit of free and open price competition when purchasing such fabrics.

40. All the aforesaid acts and conduct of the defendants herein have constituted and continue to constitute an illegal monopolization, attempt to monopolize, and combination and conspiracy to monopolize a part of the trade and commerce in fiber glass industrial fabrics among the several states, in violation of Section 2 of the Sherman Act (15 U.S.C.A. §2).

41. As a direct and proximate result of the aforesaid unlawful acts and conduct of the defendants, TEXTURA has been

injured in its business and property, has suffered great monetary damage through loss of sales and profits, good will and actual and potential customers. The entire business of TEXTURA has been effectively destroyed and TEXTURA has involuntarily been put into bankruptcy.

42. TEXTURA has been damaged by reason of the aforesaid unlawful acts of the defendants in the amount of not less than $100,000.00. Under Section 4 of the Clayton Act (15 U.S.C.A. §4) plaintiff, CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, is entitled to recover from defendants threefold the damages sustained by TEXTURA, and the costs of this suit, including a reasonable attorneys' fee.

43. The aforesaid unlawful acts and conduct of the defendants have already virtually destroyed TEXTURA'S business and property, and are a continuing and immediate threat to its existence. Unless defendants are enjoined and restrained from continuing their wrongful practices, TEXTURA will suffer irreparable and irremedial damage for which it has no adequate remedy at law.

AS AND FOR A FOURTH, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF FENESTRA ALLEGES:

44. Repeats and realleges each and every allegation contained in Paragraphs "15" through "25" hereof, inclusive, with the same force and effect as if herein fully repeated.

45. The aforesaid unlawful acts and conduct of defendants were and are also directed against FENESTRA, which undertakes and performs contracts for direct installation of fiber glass decorative fabric draperies and fiber glass industrial fabrics in large commercial buildings and relies upon TEXTURA for the materials and labor therefor.

46. As a direct and proximate result of the aforesaid unlawful acts and conduct of the defendants, FENESTRA has been injured in its business and property and has suffered and will continue to suffer great monetary damage through inability to fulfill contracts and orders on hand and loss of sales and profits, good will and actual and potential customers.

47. Repeats and realleges each and every allegation

contained in Paragraph "27" hereof with the same force and effect as if herein fully repeated.

48. FENESTRA has been and will continue to be damaged by reason of the aforesaid unlawful acts and conduct of the defendants in the amount of not less than $500,000.00. Under Section 4 of the Clayton Act (15 U.S.C.A. §15) FENESTRA is entitled to recover from defendants threefold the damages sustained by FENESTRA, and the costs of this suit, including a reasonable attorney's fee.

49. The aforesaid unlawful acts and conduct of defendants have seriously injured FENESTRA'S business and property and are a continuing and immediate threat to its existence. Unless defendants are enjoined and restrained from continuing their wrongful practices, FENESTRA will suffer irreparable and irremedial damage for which it has no adequate remedy at law.

AS AND FOR A FIFTH, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF POWRIE ALLEGES:

50. Repeats and realleges each and every allegation contained in Paragraphs "15" through "25" hereof, inclusive, with

the same force and effect as if herein fully repeated.

51. The aforesaid unlawful acts and conduct of defendants were and are also directed against plaintiff POWRIE, who is the President and majority stockholder of TEXTURA and FENESTRA, and who has pledged his own property as security for loans to TEXTURA by the co-conspirator, DOMMERICH, and personally guaranteed performance bonds for TEXTURA.

52. As a direct and proximate result of the aforesaid unlawful acts of the defendants, POWRIE has been injured in his business and property and has suffered and will continue to suffer great monetary damage through loss of salary and other benefits, loss of his aforesaid property and liability on the aforesaid performance bonds.

53. Repeats and realleges each and every allegation contained in Paragraph "27" hereof with the same force and effect as if herein fully repeated.

54. POWRIE has been and will continue to be damaged by reason of the aforesaid unlawful acts and conduct of the defen-

dants in the amount of not less than $575,000.00. Under Section 4 of the Clayton Act (15 U.S.C.A. §15) POWRIE is entitled to recover from defendants threefold the damages sustained by POWRIE, and the costs of this suit, including a reasonable attorney's fee.

55. The aforesaid unlawful acts and conduct of defendants have seriously injured POWRIE'S business and property, and are a continuing and immediate threat to his ability to engage and continue in business. Unless defendants are enjoined and restrained from continuing their wrongful practices, POWRIE will suffer irreparable and irremedial damage for which he has no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment against defendants as follows:

I. A. Plaintiff, CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, demands treble damages against defendants in the amount of:

i. $6,225,000.00 on the first and second causes of action.

ii. $300,000.00 on the third cause of action.

B. On the fourth cause of action, plaintiff

FENESTRA demands treble damages against defendants in the amount of $1,500,000.00.

C. On the fifth cause of action, plaintiff POWRIE demands treble damages against defendants in the amount of $1,725,000.00.

II. Permanently enjoining and restraining defendants and each of them, their directors, officers, employees and agents, and all other persons acting in concert or participating with them, from continuing the conspiracies, combinations, agreements and other unlawful acts and practices alleged herein.

III. A. Granting plaintiffs reasonable attorneys' fees, interest, and the costs and disbursements of this action.

B. Granting plaintiffs such other and further legal or equitable relief as to the Court may seem just and proper.

REGAN GOLDFARB POWELL & QUINN

By_____
A MEMBER OF THE FIRM
ATTORNEYS FOR PLAINTIFFS
445 Park Avenue
New York, New York 10022
Tel. No. 421-8300

Plaintiffs pursuant to Rule 38 of the Federal Rules of Civil Procedure, hereby demand a trial by jury of this action.

REGAN GOLDFARB POWELL & QUINN

By_____
A MEMBER OF THE FIRM
ATTORNEYS FOR PLAINTIFFS
445 Park Avenue
New York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. AND MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants,

-and-

VERNES GRAFSTROM,

Defendant on the Counterclaim.

ANSWER TO THE AMENDED COMPLAINT AND COUNTERCLAIM

Civil Action No. 66 Civ. 4230

Defendant Clark-Schwebel Fiber Glass Corporation ("Clark-Schwebel") for its answer to the amended complaint, alleges:

1. Denies each allegation of paragraphs 1, 12, 13, 14, and 18 through 55 of the Amended Complaint.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs of the amended complaint numbered 5, 6, 7, 9, 10 and 11.

3. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of the amended complaint numbered 15, except that defendant, Clark-Schwebel admits that Textura has made purchases of fiber glass decorative fabrics from defendant Clark-Schwebel.

4. Denies each and every allegation contained in paragraph of the amended complaint numbered 16, except admits that Clark-Schwebel Fiber Glass Corporation extended

credit to Textura on the same written terms that it accorded to other purchases of fiber glass fabrics and that Textura is still indebted to Clark-Schwebel.

5. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of the amended complaint numbered 17, except admits that Clark-Schwebel Fiber Glass Corporation at all times accepted returns of inferior quality material from purchasers or made adjustments in price therefor through credits or otherwise.

FOR A FIRST AFFIRMATIVE DEFENSE

6. Plaintiffs have failed to state a claim upon which relief can be granted.

FOR A SECOND AFFIRMATIVE DEFENSE

7. Plaintiffs' claims accruing more than four years prior to the commencement of this lawsuit are barred by the statute of limitations and laches.

FOR A THIRD AFFIRMATIVE DEFENSE AND FIRST COUNTERCLAIM AGAINST FENESTRA FABRICS, INC., TEXTURA, LTD., MALCOLM G. POWRIE AND ADDITIONAL PARTY DEFENDANT, VERNES GRAFSTROM

8. This affirmative defense and counterclaim is brought against Fenestra Fabrics, Inc., Textura Limited, Malcolm G. Powrie and Vernes Grafstrom for combining and conspiring among themselves and with certain Textura and and Fenestra employees and with others to induce Clark-Schwebel and the other defendants herein to sell fiber glass fabrics and to extend credit and rebates for advertising to Textura by falsely representing the financial condition of Textura and fraudulently concealing and failing to disclose material facts affecting Textura's financial position. These acts were done knowingly, with intention to deceive, and for the personal gain and financial

benefit of Fenestra, Textura, Powrie and Grafstrom.

9. Jurisdiction of the counterclaim is predicated upon:

(a) The pendent jurisdiction of this Court;

(b) This counterclaim arises out of the same transactions and occurrences that is the subject matter of plaintiffs' alleged claims; and

(c) There is diversity of citizenship between each plaintiff and defendant Clark-Schwebel and the value of Clark-Schwebel's claim is in excess of $10,000.00 exclusive of interest and costs.

10. Clark-Schwebel is a corporation organized under the laws of the State of New York with its principal place of business in New York.

11. Upon information and belief, Textura Limited (hereinafter "Textura") is a corporation duly organized and existing under the laws of California. From December 28, 1964 until December 13, 1966 Textura purchased decorative fiber glass fabrics from Clark-Schwebel on credit.

12. Upon information and belief, Fenestra Fabrics Inc. (hereinafter "Fenestra") is a corporation duly existing under the laws of the State of California and from December 28, 1964 until sometime after August 1, 1966 it was a wholly-owned subsidiary of Textura.

13. Upon information and belief, Malcolm G. Powrie (hereinafter "Powrie") is and was at all times relevant hereto a resident and domiciliary of the State of California and from 1964 and at all times relevant hereto he was an officer, director and majority shareholder of Textura. Upon information and belief, Powrie was and still is an officer and director of Fenestra and sometime after

August 1, 1966, the exact date unknown, Powrie became Fenestra's majority shareholder.

14. Upon information and belief, Vernes Grafstrom ("Grafstrom") is a resident of the Bahamas. Since 1962 he has been a shareholder of Textura and from 1962 until February 1967 he was a director and officer of Textura. Sometime after August 1, 1966, the exact date unknown, Grafstrom became a shareholder of Fenestra. Upon information and belief, since 1965 and at all times relevant hereto Vernes Grafstrom was and still is an officer and director of Fenestra. Grafstrom is a co-conspirator and has been named a defendant on the counterclaim herein.

15. All of the acts complained of herein were done with the knowledge and belief that the . presentations made were not true and correct or with reckless disregard for their truth and were done for the purpose of inducing sales of fiber glass fabrics to Textura and obtaining credit and rebates for advertising for Textura. Defendants on the counterclaim and their co-conspirators knew that if they had correctly stated Textura's financial condition and disclosed material facts affecting its solvency, they would have been unable to obtain credit or rebates for advertising for Textura.

16. The fraud and deceit complained of herein included:

(a) The knowing maintenance of inaccurate books of account and financial records for Textura and Fenestra for the years 1964 through 1966;

(b) The preparation of false and misleading financial statements for the years 1964 through 1966 which among other things overstated Textura's income, net worth, and working capital on all monthly and quarterly financial statements.

(c) The distribution of these false and misleading financial statements or the information contained therein during the years 1964 through 1966.

(d) The preparation of false and misleading financial projections for 1964, 1965, and 1966 which among other things overstated anticipated sales, revenues, and income and understated expenses.

(e) The distribution of such false and misleading financial projections or the information contained therein.

(f) Falsely representing the financial solvency and ability of Textura to carry on its business in 1965 and 1966 by, among other things, overstating net worth, working capital and assets.

(g) The failure to disclose all material facts relating to Textura's financial condition and solvency including but not limited to Textura's failure to meet revenue and income projections and the refusal of other suppliers to sell and/or deliver goods to Textura for reasons of its nonpayment of bills in 1965 and 1966.

(h) The deliberate creation of a false illusion of financial support for Textura by Powrie and Grafstrom, when such financial support was not intended, by presenting Grafstrom and Powrie as men of substantial personal worth who were supporting and would continue to support Textura, and by promising personal guarantees which were not forthcoming in 1966.

(i) The failure to fairly disclose personal financial transactions between Textura and its corporate officers, directors and employees and the fact that these personal transactions were adverse to Textura's interests, and contributed to its insolvency. Such transactions include the transfer of corporate real estate to Powrie personally in 1965 and 1966, the cancellation of Powrie's personal indebtedness to Textura in 1966 without consideration, the payment of personal expenses by Textura in 1965 and 1966, and the use of Textura's funds to buy out stockholders in 1966.

17. Had the defendants in this counterclaim not done the acts complained of herein, but accurately and fairly represented the financial position of Textura and had they fully disclosed all material facts relevant to the financial condition of Textura, Clark-Schwebel would not have extended credit to Textura or given advertising rebates to Textura.

18. Based on the representations made, the financial projections presented in the balance sheets, the financial reports distributed, and other acts done, Clark-Schwebel sold fiber glass fabrics and extended substantial amounts of credit to Textura. But for these representations, such credit would not have been extended to Textura.

19. In addition, based upon the representations and financial projections as to the viability of Textura, Clark-Schwebel did grant advertising rebates and

Filed 12-3-70

credits to Textura for the purposes of publishing an Engineer's Guide to be used as a sales brochure. Had Clark-Schwebel known the true financial position and ability of Textura to carry on its business in the future, it would not have extended credit or advertising rebates to Textura for the publication of the Engineer's Guide.

20. Clark-Schwebel did justifiably rely on the representations made to it and acts done by defendants to this counterclaim and their co-conspirators as to the financial condition of Textura and did not know or have reason to know the falsity of these representations.

21. Defendants to this counterclaim and their co-conspirators concealed their combination and conspiracy to induce the extension of credit and advertising rebates by fraud and deceit. It was not until August, 1970, that Clark-Schwebel had knowledge, or reasonably could have had knowledge of, this combination and conspiracy.

22. As a result of the fraud complained of herein, Clark-Schwebel Fiber Glass Corporation has been damaged in the amount of at least $57,132.53 and has suffered lost profits in an amount yet to be ascertained.

23. By reason of the fact that the acts complained of here were done with full knowledge and with the intent that they mislead and induce the granting of credit and advertising rebates to Textura, Clark-Schwebel is entitled to punitive damages in the amount of $500,000.

24. Powrie, Fenestra, Textura and Grafstrom are jointly and severally liable for the damages sustained by Clark-Schwebel herein.

WHEREFORE, Clark-Schwebel demands judgment (a) against plaintiffs dismissing the Amended Complaint, (b) on its counterclaim jointly and severally against Malcolm G. Powrie, Vernes Grafstrom, Fenestra Fabrics, Inc. and Textura Limited in the amount of at least

$557,132.53 plus lost profits yet to be determined, (c) for the costs and disbursements of this action, and (d) such other relief as the Court may deem appropriate.

Dated: New York, New York
December 9, 1970

WHITE & CASE

By C. J. Rogers W. Hamilton
A Member of the Firm
Attorneys for Clark-Schwebel
Fiber Glass Corporation
14 Wall Street
New York, New York 10005
Telephone: 732-1040

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants,

and

VERNES GRAFSTROM,

Defendant on the Counterclaim.

Civil Action No. 66 Civ. 4230

ANSWER AND COUNTERCLAIM OF J. P. STEVENS & COMPANY, INC.

J. P. Stevens & Company, Inc. ("Stevens"), for its answer to the Amended Complaint:

1. Denies the allegations of paragraph 1, except admits that plaintiffs purport to bring this action under the provisions of law specified therein.

2. Denies sufficient knowledge or information to form a belief as to the allegations in paragraph 3, except admits that Stevens transacts business in the Southern District of New York.

3. Denies the allegations of paragraph 4, except admits that venue is purported to be based on Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 22).

4. Denies sufficient knowledge or information to form a belief as to the allegations of paragraph 5, except (a) denies that Glass Fabrics, Inc. is the predecessor in interest to Textura, Ltd. ("Textura"), and (b) admits that Carlyle Michelman was appointed a trustee of Textura in or about April 1967 in a bankruptcy proceeding in the United States District Court, Central District of California.

5. Denies sufficient knowledge or information to form a belief as to the allegations of paragraphs 6 and 7.

6. Denies sufficient knowledge or information to form a belief as to the allegation in paragraphs 8 and 9.

7. Denies the allegations in paragraph 10, except admits that Stevens is a Delaware corporation with its principal offices in New York, and that it engages, among other things, in the business of weaving and selling fiberglass decorative and fiberglass industrial fabrics.

8. Denies sufficient knowledge or information to form a belief as to the allegations of paragraph 11, except admits that L. F. Dommerich & Company ("Dommerich") is not a defendant herein and that plaintiffs purport to name it as a co-conspirator.

9. Denies the allegations of paragraph 16, except (a) admits it extended credit on the same written terms to Textura that it accorded to other purchasers of fiberglass fabrics and (b) denies sufficient knowledge or information as to the allegations concerning the terms on which the other defendants extended credit to purchasers of fiberglass fabrics.

10. Denies the allegations of paragraph 17, except admits that it accepted returns from Textura and other purchasers of decorative fiberglass fabrics and has taken due account thereof through credit adjustments or otherwise and denies knowledge or information as to the practices of other weavers.

11. Denies the allegations of paragraphs 2, 12, 13, 14, 15 and 18 through 55.

FIRST AFFIRMATIVE DEFENSE

12. Plaintiffs have failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

13. Plaintiffs' alleged claims, accruing more than four years prior to the commencement of this lawsuit, are barred by the statute of limitations and laches.

COUNTERCLAIM

For its counterclaim against Fenestra Fabrics, Inc. ("Fenestra"), Textura, Malcolm G. Powrie and Vernes Grafstrom, Stevens alleges:

14. This counterclaim arises out of the same transactions that are the subject matter of plaintiffs' alleged claims.

15. There is diversity of citizenship between Stevens and each counterclaim defendant, and the sum in controversy is in excess of $10,000.00 exclusive of interest and costs.

16. Stevens is a Delaware corporation with its principal place of business in New York.

17. Upon information and belief, Textura is a California corporation. From December 28, 1964 until December 13, 1966, Textura purchased decorative fiberglass fabrics from Stevens on credit.

18. Upon information and belief, Fenestra is a California corporation. From December 28, 1964 until sometime after August 1, 1966 Fenestra was a wholly-owned subsidiary of Textura.

19. Upon information and belief, Malcolm G. Powrie is a resident of California. From 1964 and at all times relevant hereto, he was an officer, director and majority shareholder of Textura. Powrie was and still is an officer and director of Fenestra; sometime after August 1, 1966, he became Fenestra's majority shareholder.

20. Upon information and belief, Vernes Grafstrom is a resident of the Bahamas; since 1962 he has been a shareholder of Textura, and from 1962 until February 1967 he was a director and officer of Textura. Sometime after August 1, 1966, Grafstrom became a shareholder of Fenestra, and since 1965 has been an officer and director of Fenestra.

21. Counterclaim defendants combined and conspired among themselves, with Textura and Fenestra employees, and with others unknown, to induce Stevens to sell fiberglass fabrics and extend credit to Textura by falsely representing the financial condition of Textura t[illegible] Counterclaim

tion of deceiving Stevens, and for their personal gain and financial benefit. Counterclaim defendants knew that if they had truly represented Textura's financial condition, Stevens would not have extended credit to Textura.

22. Counterclaim defendants prepared and distributed to Stevens false and misleading financial statements for the years 1964 through 1966 which, among other things, overstated Textura's income, net worth and working capital on all monthly and quarterly financial statements.

23. Counterclaim defendants disseminated to Stevens orally and in writing, false and misleading financial projections for 1964 through 1966, which, among other things, overstated anticipated sales, revenues and income, and understated expenses.

24. Counterclaim defendants orally imparted to Stevens false and misleading information about the financial condition of Textura for the years 1964 through 1966, including misrepresentations in 1965 and 1966 of the financial solvency and ability of Textura to carry on its business, by, among other things, overstating net worth, working capital and assets.

25. Counterclaim defendants falsely represented Textura's financial condition to Stevens by deliberately concealing material facts relating to Textura's financial condition and solvency, including but not limited to:

(a) Textura's failure to meet revenue and income projections;

(b) The refusal of other suppliers to sell and/or deliver goods to Textura because of its

non-payment of bills in 1965 and 1966;

(c) Personal financial transactions between Textura and its officers and shareholders which were financially detrimental to Textura and contributed to its financial insolvency, including but not limited to: (i) the transfer of Textura's real estate to Powrie in 1965 and 1966, (ii) the cancellation of Powrie's personal indebtedness to Textura in 1966 without consideration, (iii) Textura's payment of personal expenses of its officers in 1965 and 1966, and (iv) the use of Textura's funds to buy out stockholders in 1966.

26. Counterclaim defendants misrepresented Textura's financial condition by falsely representing to Stevens that Grafstrom and Powrie were men of substantial personal means who were giving and would continue to give financial support to Textura, in amounts at least sufficient to enable Textura to pay its bills to Stevens.

27. In selling fiberglass fabrics and extending credit to Textura from 1964 through 1966, Stevens relied on the false representations complained of herein without knowing them to be false.

28. Stevens would not have extended credit to Textura if counterclaim defendants (i) had not made the misrepresentations complained of and (ii) had fully and accurately disclosed to it Textura's true financial condition.

29. It was not until August 1973 that Stevens knew or had reason to know of the fraud and deceit complained of herein.

30. By reason of the fraud complained of herein, Stevens has been damaged

(a) in the amount of $17,156.60; and

(b) by loss of profits in an amount as yet to be ascertained.

31. The misrepresentations complained of herein were made wilfully, with the intent to deceive Stevens and induce it to sell fiberglass fabrics and extend credit to Textura. These misrepresentations were made with the knowledge that they would cause economic injury to Stevens or in reckless disregard of such injury. By reason of the foregoing, Stevens is entitled to punitive damages in the amount of $500,000.

32. The acts, representations and other conduct complained of herein were done, or authorized to be done, or were acquiesced in with full knowledge thereof, by Powrie individually and Grafstrom individually, and each is individually liable to Stevens.

WHEREFORE, J. P. Stevens & Co., Inc. demands judgment (a) against plaintiffs dismissing the Amended Complaint, (b) on its counterclaim jointly and severally against Malcolm B. Powrie, Vernes Grafstrom, Fenestra Fabrics, and Textura Ltd. in the amount of $517,156.60 plus lost profits yet to be determined, (c) for the costs and disbursements of this action, and

(d) such other relief as the Court may deem appropriate.

Dated: New York, New York
December 31, 1970.

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON
Attorneys for J. P. Stevens & Co.
345 Park Avenue
New York, New York

By /s/ Allan L. Blumstein
A Member of the Firm

UNITED STATES DIST. CT. JRT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA LTD. IN BANKRUPTCY, et al.,

Plaintiffs,

against

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J.P. STEVENS & CO., INC.,

v.

Defendant

VERNES GRAFSTROM,

Defendant on the Counterclaim.

Index No. 66 Civil 4230

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is associated with Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison *attorney(s) of record for* defendant J. P. Stevens & Co., Inc.

That on the 30th *day of* December, *19* 70 *deponent served the annexed* Answer and Counterclaim *on* Regan, Goldfarb, Powell & Quinn, Esqs. *attorney(s) for* Plaintiffs *in this action at* 445 Park Avenue, New York, New York *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this 30th *day of* December *19* 70.

/s/ Elizabeth Holtzman

The name signed must be printed beneath

Elizabeth Holtzman

Attorney at Law

1. Denies the allegations of paragraph 1, except admits that plaintiffs purport to bring this action under the provisions of law specified therein.

2. Denies sufficient knowledge or information to form a belief as to the allegations in paragraph 3, except admits that Stevens transacts business in the Southern District of New York.

3. Denies the allegations of paragraph 4, except admits that venue is purported to be based on Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 22).

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Index No.

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in -- a post office -- official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me

this day of 19 .....

The name signed must be printed beneath

1. Denies the allegations of paragraph 1, except admits that plaintiffs purport to bring this action under the provisions of law specified therein.

2. Denies sufficient knowledge or information to form a belief as to the allegations in paragraph 3, except admits that Stevens transacts business in the Southern District of New York.

3. Denies the allegations of paragraph 4, except admits that venue is purported to be based on Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 22).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. AND MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants,

-and-

VERNES F. GRAFSTROM,

Defendant on the Counterclaim.

- -x

Civil Action No.
66 CIV. 4230

ANSWER AND COUNTERCLAIM OF DEFENDANT BURLINGTON INDUSTRIES, INC.

Burlington Industries, Inc. ("Burlington"), for its answer to the Amended Complaint:

1. Denies the allegations of paragraph 1, except admits that plaintiffs purport to bring this action under the antitrust laws specified.

2. Denies the allegations of paragraph 2.

3. Denies the allegations of paragraph 3, except admits that it maintains offices, transacts business, and is found within the Southern District of New York, and, upon information and belief, that defendants Clark-Schwebel Fiber Glass Corporation and J. P. Stevens and Company, Inc., transact business or are found within the Southern District of New York.

4. Admits the allegations of paragraph 4, except denies that any of the plaintiffs is a person injured in its business or property by reason of anything forbidden in the antitrust laws.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5, except: (a) admits that Carlyle Michelman was appointed a trustee of Textura, Ltd. ("Textura") in or about April 1967; (b) admits

and avers that Textura at various times within the period covered by the allegations of the Amended Complaint has been engaged, directly or indirectly, in the purchase of fiber glass decorative fabrics, their conversion into draperies and the sale thereof for various uses in office, commercial, apartment, public or other buildings; and (c) admits that plaintiff Textura purchased de minimis amounts of fiber glass industrial fabrics from Burlington within the period of time covered by the allegations of the Amended Complaint.

6.-8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6, 7 and 8.

9. Admits the allegations of paragraph 9, except denies that its principal place of business is in New York City, New York, and avers that its principal place of business is in Greensboro, North Carolina.

10.-11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 10 and 11, except admits that L.F. Dommerich and Company, Inc. ("Dommerich") is not a defendant herein and that plaintiffs purport to name it as a co-conspirator.

12.-14. Denies the allegations of paragraphs 12, 13 and 14.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15, except admits and avers that during the period of time covered by the Amended Complaint Textura purchased or sought to purchase fiber glass decorative fabrics from defendant Burlington.

16. Denies the allegations of paragraph 16, except admits and avers that the defendant Burlington has at all times applied to Textura the same credit policies applicable to all purchasers and that Textura is still indebted to Burlington in a substantial amount.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17, except admits and avers that the defendant Burlington has at all times during the period covered by the Amended Complaint accepted returns of inferior quality material from Textura and other purchasers of fiber glass decorative fabrics and has taken due account thereof through credit adjustments or otherwise. Further answering, defendant Burlington avers that its practice and policy with regard to returns of inferior quality material was at no time modified or discriminatorily applied as to Textura or any of the plaintiffs herein.

18.-55. Denies the allegations of paragraphs 18 to 55, inclusive.

FIRST AFFIRMATIVE DEFENSE

The Amended Complaint, and each of the five separate causes of action alleged therein, fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims accruing more than four years prior to the commencement of this lawsuit are barred by the statute of limitations and laches.

COUNTERCLAIM

For its counterclaim against Fenestra Fabrics, Inc. ("Fenestra"), Textura Ltd. ("Textura"), Malcolm G. Powrie ("Powrie") and Vernes F. Grafstrom ("Grafstrom"), Burlington avers:

1. Counterclaim defendants combined and conspired among themselves, with employees of Textura and Fenestra, and with parties unknown, to induce Burlington to sell fiber glass fabrics and to extend credit to Textura by falsely representing the financial condition of Textura to Burlington and by fraudulently concealing from and failing to disclose to Burlington material

facts affecting Textura's financial position when a duty existed to disclose such information. Counterclaim defendants did all the acts complained of herein knowingly, with the intention to deceive Burlington, and for their own personal gain and financial benefit.

2. Jurisdiction of this counterclaim is based upon:

(a) The pendent jurisdiction of this Court;

(b) The fact that this counterclaim arises out of the same transactions as give rise to plaintiffs' alleged claims;

(c) The diversity of citizenship existing between Burlington and each counterclaim defendant and the fact that the sum in controversy on this counterclaim is in excess of $10,000, exclusive of interest and costs.

3. Burlington is a corporation incorporated in the State of Delaware with its principal place of business in the State of North Carolina.

4. Upon information and belief, Textura is a corporation organized and existing under the laws of California. From about December 28, 1964, until about December 13, 1966, Textura purchased fiber glass fabrics from Burlington on credit.

5. Upon information and belief, Fenestra is a corporation organized and existing under the laws of California. From about December 28, 1964 until some time after August 1, 1966, Fenestra was a wholly owned subsidiary of Textura.

6. Upon information and belief, Malcolm G. Powrie is a resident of California and since 1964, and at all times relevant hereto, he was an officer, director and majority shareholder of Textura. Powrie was and still is an officer and director of Fenestra and some time after August 1, 1966, he became Fenestra's majority shareholder.

7. Upon information and belief, Vernes F. Grafstrom is a resident of the Bahamas. Since 1964, and at all times relevant hereto, he was a shareholder of Textura and from 1962 until about February 1967, he was a director and officer of Textura. Some time after August 1, 1966, Grafstrom became a shareholder of Fenestra, and since 1965 he has been an officer and director of Fenestra.

8. All of the acts of misrepresentation complained of herein were done with the knowledge and belief that they were not true or with reckless disregard for their truth and were done for the purpose of inducing Burlington to make sales of fiber glass fabrics and to extend credit to Textura. Counterclaim defendants and their co-conspirators knew that had they truly represented Textura's financial condition and disclosed to Burlington material facts affecting its solvency, Burlington would not have extended credit to Textura.

9. To induce Burlington to make sales and to extend credit to Textura, counterclaim defendants:

(a) Intentionally prepared and distributed to Burlington, or otherwise communicated to it, false and misleading financial statements for the years 1964 through 1966 which, among other things, over-stated and misrepresented Textura's income by the inclusion of income not earned by or otherwise due to Textura and by the inclusion in earnings reports for prior months of income actually earned in subsequent months.

(b) Intentionally prepared and distributed to Burlington, or otherwise communicated to it, false and misleading financial projections for the years 1964 through 1966, which, among other things, over-stated and misrepresented anticipated sales, revenues, and income when, in fact, defendants fully knew that such projections would not be met.

(c) Willfully misrepresented to Burlington the financial solvency of Textura and its ability to carry on its business in the years 1964, 1965 and 1966 by, among other things, over-stating net worth, working capital and assets;

(d) Fraudulently concealed material facts relating to Textura's financial condition and solvency, including, but not limited to, Textura's failure to meet revenue and income projections and the refusal of other suppliers to sell and/or deliver goods to Textura because of its failure to pay its bills in 1965 and 1966;

(e) Deliberately misrepresented Textura's financial stability by falsely representing that Grafstrom and Powrie were men of substantial personal means who were giving and would continue to provide financial support for Textura in amounts at least sufficient to enable Textura to pay its bills to Burlington;

(f) Intentionally failed fully to disclose personal financial transactions with Textura which were financially detrimental to Textura and contributed to its financial insolvency, including, but not limited to: (i) the transfer of Textura's real estate to Powrie in 1965 and 1966; (ii) the cancellation of Powrie's personal indebtedness to Textura in 1966 without consideration; (iii) the payment by Textura of the personal expenses of its officers in 1965 and 1966; and (iv) the use of Textura's funds to buy out stockholders in 1966.

(g) Suppressed and concealed from Burlington the fact that contracts and orders regarding work begun by Textura were being and were to be transferred to other companies in which Powrie was financially interested, or otherwise disposed of to Powrie's personal profit and gain, at a time when counterclaim defendants, but not Burlington, knew that

Textura would be unable to pay its bills or continue in business.

10. Burlington would not have extended credit to Textura if counterclaim defendants had not made the misrepresentations complained of herein and had fully and accurately disclosed to it Textura's true financial condition.

11. In making sales of fiber glass fabrics and extending credit to Textura during the years 1964 through 1966, Burlington relied on the false representations complained of herein without knowing them to be false and counterclaim defendants were fully aware that Burlington was relying on these representations. Counterclaim defendants had a duty and obligation to Burlington to disclose fully and accurately the true financial position of Textura.

12. It was not until August 1970 that Burlington knew or had reason to know of the fraud and deceit complained of herein.

13. By reason of the fraud complained of in this counterclaim, Burlington has been damaged in the amount of $16,156.60 for goods sold and delivered to Textura but never paid for. Burlington has been further damaged by loss of profits in an amount not as yet ascertained.

14. The misrepresentations complained of herein were made willfully, with the intent to deceive Burlington and to induce it to sell fiber glass fabrics and to extend credit to Textura. These misrepresentations were made with the knowledge that they would cause economic injury to Burlington. By reason of such willful conduct, Burlington is entitled to punitive damages in the amount of $500,000.

15. The acts, misrepresentations and other conduct complained of herein as constituting fraud and deceit were done, or authorized to be done or were acquiesced in with full knowledge thereof, by Powrie individually and by Grafstrom individually,

and each of these counterclaim defendants is individually liable to Burlington.

WHEREFORE, Burlington Industries, Inc., demands judgment:

(a) Against plaintiffs dismissing the Amended Complaint;

(b) On its counterclaim jointly and severally against Malcolm G. Powrie, Vernes F. Grafstrom, Fenestra Fabrics, Inc., and Textura Ltd., in the amount of $516,156.60, plus lost profits yet to be determined;

(c) For the costs and disbursements of this action; and

(d) Such other relief as the court may deem appropriate.

DATED: New York, New York
December 29, 1970

ROBERT P. LYNN
1345 Avenue of the Americas
New York, New York 10019

BERGSON, BORKLAND, MARGOLIS
& ADLER

By_____

888 - 17th Street, N. W.
Washington, D. C. 20006

Attorneys for Burlington
Industries, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer and Counterclaim of Defendant Burlington Industries, Inc., was served on Peter G. Corbett, Esquire, a member of the firm of Regan Goldfarb, Powell & Quinn, attorneys for plaintiffs, by mailing a true copy thereof to his office at 445 Park Avenue, New York, New York 10022 this 29th day of December, 1970.

DONALD L. HARDISON

Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. AND MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. AND J. P. STEVENS & COMPANY, INC.,

Defendants,

-and-

VERNES GRAFSTROM,

Defendant on the Counterclaim.

REPLY

CIVIL ACTION NO. 66 CIV. 4230

Plaintiffs CARLYLE MICHELMAN, Trustee of TEXTURA, LTD. ("TEXTURA"), FENESTRA FABRICS, INC. ("FENESTRA") and MALCOLM G. POWRIE ("POWRIE") and defendant on the counterclaim VERNES GRAFSTROM ("GRAFSTROM"), by their attorneys, for their reply to the counterclaim contained in the answer of defendant CLARK-

SCHWEBEL FIBER GLASS CORPORATION ("CLARK-SCHWEBEL") to the amended complaint:

1. Deny each and every allegation contained in Paragraph "8" of the answer, except admits that defendant CLARK-SCHWEBEL has purported to assert an affirmative defense and counterclaim as alleged therein.

2. Deny, upon information and belief, each and every allegation contained in Paragraph "9" of the answer.

3. Deny each and every allegation contained in Paragraph "11" of the answer, except admit that TEXTURA is a corporation duly organized under the laws of the State of California and that it and its predecessor, GLASS FABRICS, INC., purchased fiber glass fabrics from CLARK-SCHWEBEL on credit until in or about March 1966.

4. Deny each and every allegation contained in Paragraph "14" of the answer except admit that GRAFSTROM is a resident of the Bahamas, has been a shareholder, director and officer of TEXTURA since in or about 1962, has been a shareholder, officer and director of FENESTRA since in or about 1965 and has

been named a defendant on the purported counterclaim herein.

5. Deny each and every allegation contained in Paragraphs "15" and "16" of the answer.

6. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs "17", "18", "19" and "20" of the answer, except deny that any false or fraudulent representations or acts were made or engaged in by plaintiffs or GRAFSTROM, and admit that CLARK-SCHWEBEL extended certain credit to TEXTURA for purchases and for an "Engineer's Guide" sales brochure.

7. Deny each and every allegation contained in Paragraph "21" of the answer.

8. Deny each and every allegation contained in Paragraphs "22", "23" and "24" of the answer.

FOR A FIRST AFFIRMATIVE DEFENSE

9. This Court lacks jurisdiction over the person of the prospective defendant-by-counterclaim GRAFSTROM.

FOR A SECOND AFFIRMATIVE DEFENSE

10. Defendant CLARK-SCHWEBEL by serving the Answer to the Amended Complaint and Counterclaim has attempted to amend its pleadings without leave of Court or the written consent of plaintiffs to so amend the pleading, as required by Rule 15(a) of the Federal Rules of Civil Procedure.

11. By reason of the foregoing, defendant's purported pleading is in violation of the Federal Rules of Civil Procedure and therefore without validity.

FOR A THIRD AFFIRMATIVE DEFENSE

12. Defendant CLARK-SCHWEBEL has attempted by means of the service of the Answer to the Amended Complaint along with the Summons to bring in an additional party and assert a counterclaim just three weeks prior to the deadline for completion of all discovery imposed by prior peremptory order of this Court.

13. Plaintiffs were not given any opportunity to be heard on the question of bringing in an additional party or

asserting a counterclaim at this extremely late stage in the proceedings, nor were all the material facts disclosed in defendant's ex parte application.

14. Based upon the foregoing, defendant's counterclaim and its attempt to bring in GRAFSTROM as an additional party on the counterclaim are improper and invalid.

FOR A FOURTH AFFIRMATIVE DEFENSE

15. At this extremely late stage in the action it is oppressive and unreasonable to attempt to bring in additional parties and to assert the counterclaim in question, thus depriving plaintiffs and GRAFSTROM of any reasonable opportunity for discovery.

16. Defendants admit knowledge of the alleged combination and conspiracy at least as early as August, 1970 and have had ample opportunity to assert their counterclaim and to join GRAFSTROM upon proper notice and hearing long prior to December 9, 1970.

17. By reason of the foregoing, it would be an

abuse of discretion to allow defendant CLARK-SCHWEBEL to assert this counterclaim or to bring in GRAFSTROM as an additional party thereon.

FOR A FIFTH AFFIRMATIVE DEFENSE

18. Defendant CLARK-SCHWEBEL has failed to state a claim upon which relief can be granted.

FOR A SIXTH AFFIRMATIVE DEFENSE

19. Upon information and belief, this Court lacks jurisdiction of the subject matter of the counterclaim.

WHEREFORE, plaintiffs and defendant on the counterclaim demand judgment dismissing the counterclaim together with the costs and disbursements of this action and granting such other and further relief as the Court may deem appropriate.

Dated: New York, New York
December 28, 1970

REGAN GOLDFARB POWELL & QUINN

By _____
A MEMBER OF THE FIRM
ATTORNEYS FOR PLAINTIFFS AND
DEFENDANT ON THE COUNTERCLAIM
445 Park Avenue
New York, New York 10022
Tel. No. 421-8800

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

REGAN GOLDFARB POWELL & QUINN

Attorneys for

Office and Post Office Address

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

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one of the judges of the within named Court at

on the day of 19

at M.

Dated,

Yours, etc.,

REGAN GOLDFARB POWELL & QUINN

Attorneys for

Office and Post Office Address

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 66 CIV. 4230 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, et al,

Plaintiffs,

-against-

CLARK SCHWEBEL FIBER GLASS CORPORATION, et al,

Defendants,

-and-

VERNES GRAFSTROM,
Defendant on the Counterclaim.

REPLY

REGAN GOLDFARB POWELL & QUINN

Attorneys for Plaintiffs & Defendant on the Counterclaim

Office and Post Office Address, Telephone

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

(212) 421-8800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

1800-©1969, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

106

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

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Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

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AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

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That on the day of 19 at No. deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. AND MALCOLM G. POWRIE, Plaintiffs, -against- CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. AND J. P. STEVENS & COMPANY, INC., Defendants, -and- VERNES GRAFSTROM, Defendant on the Counterclaim.	REPLY 66 CIV. 4230

Plaintiffs CARLYLE MICHELMAN, Trustee of TEXTURA, LTD. ("TEXTURA"), FENESTRA FABRICS, INC. ("FENESTRA") and MALCOLM G. POWRIE ("POWRIE") and defendant on the counterclaim VERNES GRAFSTROM ("GRAFSTROM"), by their attorneys, for their reply to the counterclaim contained in the answer of defendant J. P. STEVENS & COMPANY, INC. ("STEVENS") to the amended complaint:

1. Deny each and every allegation contained in Paragraph "14" of the Answer.

2. Deny each and every allegation contained in Paragraph "15" of the Answer, except admits that there appears to be diversity of citizenship between STEVENS and each counterclaim defendant.

3. Deny each and every allegation contained in Paragraph "17" of the Answer, except admit that TEXTURA is a corporation duly organized under the laws of the State of California and that it and its predecessor, GLASS FABRICS, INC., purchased fiber glass fabrics from STEVENS from time to time on credit until TEXTURA was forced out of business in or about December 1966.

4. Deny each and every allegation contained in Paragraphs "21" through "26" inclusive of the Answer.

5. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs "27" and "28" of the Answer, except deny that any false or fraudulent representations or acts were made or engaged in by plaintiffs or GRAFSTROM, and admit that STEVENS extended certain credit to TEXTURA for purchases.

6. Deny each and every allegation contained in Paragraphs "29" through "32" inclusive of the Answer.

FOR A FIRST AFFIRMATIVE DEFENSE

7. This Court lacks jurisdiction over the person of the prospective defendant-by-count rclaim GRAFSTROM.

FOR A SECOND AFFIRMATIVE DEFENSE

8. Defendant STEVENS by serving the Answer to the Amended Complaint and Counterclaim has attempted to amend its pleadings without leave of Court or the written consent of plaintiffs to so amend the pleading, as required by Rule 15(a) of the Federal Rules of Civil Procedure.

9. By reason of the foregoing, defendant's purported pleading is in violation of the Federal Rules of Civil Procedure and therefore without validity.

FOR A THIRD AFFIRMATIVE DEFENSE

10. Defendant STEVENS has attempted by means of the service of the Answer to the Amended Complaint to bring in

an additional party and assert a counterclaim after the deadline for completion of all discovery imposed by prior peremptory order of this Court.

11. Plaintiffs were not given any opportunity to be heard on the question of bringing in an additional party or asserting a counterclaim at this extremely late stage in the proceedings.

12. Based upon the foregoing, defendant's counterclaim and its attempt to bring in GRAFSTROM as an additional party on the counterclaim are improper and invalid.

FOR A FOURTH AFFIRMATIVE DEFENSE

13. At this extremely late stage in the action it is oppressive and unreasonable to attempt to bring in additional parties and to assert the counterclaim in question, thus depriving plaintiffs and GRAFSTROM of any reasonable opportunity for discovery.

14. Defendant admits knowledge of the alleged combination and conspiracy at least as early as August, 1970 and

has had ample opportunity to assert its counterclaim and to join GRAFSTROM upon proper notice and hearing.

15. By reason of the foregoing, it would be an abuse of discretion to allow defendant STEVENS to assert this counterclaim or to bring in GRAFSTROM as an additional party thereon.

FOR A FIFTH AFFIRMATIVE DEFENSE

16. Defendant STEVENS has failed to state a claim upon which relief can be granted.

FOR A SIXTH AFFIRMATIVE DEFENSE

17. Upon information and belief, this Court lacks jurisdiction of the subject matter of the counterclaim.

WHEREFORE, plaintiffs and defendant on the counterclaim demand judgment dismissing the counterclaim together with the costs and disbursements of this action and granting such other and further relief as the Court may deem appropriate.

Dated: New York, New York
January 21, 1971

REGAN GOLDFARB POWELL & QUINN

By _____
A MEMBER OF THE FIRM
ATTORNEYS FOR PLAINTIFFS AND DEFENDANT ON THE COUNTERCLAIM
445 Park Avenue
New York, New York 10022
Tel. No. 421-8800

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

REGAN GOLDFARB POWELL & QUINN

Attorneys for

Office and Post Office Address

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

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one of the judges of the within named Court, at

on the day of 19

at M.

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Yours, etc.,

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Attorneys for

Office and Post Office Address

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BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 66 CIV. 4230 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, et al,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al,

Defendants,

ETC.

REPLY

REGAN GOLDFARB POWELL & QUINN

Attorneys for Plaintiffs & Defendant on the Counterclaim

Office and Post Office Address, Telephone

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

(212) 421-8800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

1800-©1963, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

113

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
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The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.:

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Sworn to before me, this day of 19 .....

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STATE OF NEW YORK, COUNTY OF ss.:

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being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

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deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19 .....

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. AND MALCOLM G. POWRIE, Plaintiffs, -against- CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. AND J. P. STEVENS & COMPANY, INC., Defendants, -and- VERNES GRAFSTROM, Defendant on the Counterclaim.	REPLY 66 CIV. 4230

Plaintiffs CARLYLE MICHELMAN, Trustee of TEXTURA, LTD. ("TEXTURA"), FENESTRA FABRICS, INC. ("FENESTRA") and MALCOLM G. POWRIE ("POWRIE") and defendant on the counterclaim VERNES GRAFSTROM ("GRAFSTROM"), by their attorneys, for their reply to the counterclaim contained in the answer of defendant BURLINGTON INDUSTRIES, INC. ("BURLINGTON") to the amended complaint:

1. Deny each and every allegation contained in Paragraph "1" of the Counterclaim.

2. Deny, upon information and belief, each and every allegation contained in Paragraph "2" of the Counterclaim.

3. Deny each and every allegation contained in Paragraph "4" of the Counterclaim, except admit that TEXTURA is a corporation duly organized under the laws of the State of California and that it and its predecessor, GLASS FABRICS, INC., purchased fiber glass fabrics from BURLINGTON from time to time on credit until TEXTURA was forced out of business in or about December 1966.

4. Deny each and every allegation contained in Paragraphs "8" and "9" of the Counterclaim.

5. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in Paragraphs "10" and "11" of the Counterclaim, except deny that any false or fraudulent representations or acts were made or engaged in by plaintiffs or GRAFSTROM, and admit that BURLINGTON extended certain credit to TEXTURA for purchases.

FOR A FIRST AFFIRMATIVE DEFENSE

6. This Court lacks jurisdiction over the person of the prospective defendant-by-counterclaim GRAFSTROM.

FOR A SECOND AFFIRMATIVE DEFENSE

7. Defendant BURLINGTON by serving the Answer to the Amended Complaint and Counterclaim has attempted to amend its pleadings without leave of Court or the written consent of plaintiffs to so amend the pleading, as required by Rule 15(a) of the Federal Rules of Civil Procedure.

8. By reason of the foregoing, defendant's purported pleading is in violation of the Federal Rules of Civil Procedure and therefore without validity.

FOR A THIRD AFFIRMATIVE DEFENSE

9. Defendant BURLINGTON has attempted by means of the service of the Answer to the Amended Complaint to bring in an additional party and assert a counterclaim after the deadline for completion of all discovery imposed by prior peremptory order of this Court.

10. Plaintiffs were not given any opportunity to be heard on the question of bringing in an additional party or asserting a counterclaim at this extremely late stage in the proceedings.

11. Based upon the foregoing, defendant's counterclaim and its attempt to bring in GRAFSTROM as an additional party on the counterclaim are improper and invalid.

FOR A FOURTH AFFIRMATIVE DEFENSE

12. At this extremely late stage in the action it is oppressive and unreasonable to attempt to bring in additional parties and to assert the counterclaim in question, thus depriving plaintiffs and GRAFSTROM of any reasonable opportunity for discovery.

13. Defendant admits knowledge of the alleged combination and conspiracy at least as early as August, 1970 and has had ample opportunity to assert its counterclaim and to join GRAFSTROM upon proper notice and hearing.

14. By reason of the foregoing, it would be an abuse of discretion to allow defendant BURLINGTON to assert this counterclaim or to bring in GRAFSTROM as an additional party thereon.

FOR A FIFTH AFFIRMATIVE DEFENSE

15. Defendant BURLINGTON has failed to state a claim upon which relief can be granted.

FOR A SIXTH AFFIRMATIVE DEFENSE

16. Upon information and belief, this Court lacks jurisdiction of the subject matter of the counterclaim.

WHEREFORE, plaintiffs and defendant on the counterclaim demand judgment dismissing the counterclaim together with the costs and disbursements of this action and granting such other and further relief as the Court may deem appropriate.

Dated: New York, New York
January 21, 1971

REGAN GOLDFARB POWELL & QUINN

By _____
A MEMBER OF THE FIRM
ATTORNEYS FOR PLAINTIFFS AND DEFENDANT ON THE COUNTERCLAIM
445 Park Avenue
New York, New York 10022
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NOTICE OF ENTRY

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Dated,

Yours, etc.,
REGAN GOLDFARB POWELL & QUINN
Attorneys for

Office and Post Office Address
445 PARK AVENUE
BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

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To

Attorney(s) for

Index No. 66 CIV. 4230 Year 19
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, et al,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al,

Defendants,

ETC.

REPLY

REGAN GOLDFARB POWELL & QUINN
Attorneys for Plaintiffs & Defendant on the Counterclaim
Office and Post Office Address, Telephone
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(212) 421-8800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

120

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

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Sworn to before me, this day of 19 .....

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELSON, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. AND MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. AND J. P. STEVENS & COMPANY, INC.,

Defendants,

-and-

VERNILS F. GRAFSTROM,

Defendant on the Counterclaim.

ANSWERS TO INTERROGATORIES (III)

66 CIV. 4230
Cal No. 156(2)

Defendant, Clark-Schwebel Fiber Glass Corporation, answers under oath, the following interrogatories propounded by Malcom G. Powrie, Textura Ltd., Fenestra Fabrics Inc. and Vernon F. Grafstrom on December 30, 1970:

QUESTION

1. With respect to Paragraph 8 of the Answer to the Amended Complaint and Counterclaim (hereinafter "Answer"):

(a) State the facts upon which the allegation is based that plaintiffs and defendant on the counterclaim and certain other TEXTURA and FENESTRA employees entered into the combination and conspiracy claimed, including, without limitation,

(i) the date or dates and place or places at which such conspiracy was entered into;

(ii) whether the agreement or agreements were oral or in writing, or both,

identifying each writing, if any, in a manner suitable for use as a description in a subpoena;

(iii) the name and position of each individual who either initiated, negotiated, signed, approved or otherwise consented to entering into such conspiracy.

ANSWER

1. (a) The facts upon which this allegation is based are set forth in detail in the remaining answers to this set of interrogatories.

(i) The conspiracy was entered into as early as 1964, the exact date being unknown to Clark-Schwebel Fiber Glass Corporation (hereinafter Clark-Schwebel). Based on material obtained from Textura's files in August, 1970, Clark-Schwebel has found evidence that the conspiratorial acts engaged in by the conspirators commenced as early as August 1964 with the publication of the financial statements for August 1964.

(ii) Upon information and belief the agreement or agreement forming the conspiracy were oral.

(iii) The individuals who entered into the conspiracy were Malcolm G. Powrie, President and a Director of Textura Limited and Fenestra Fabrics, Inc., and Vernes F. Grafstrom, Vice President and a director of both companies.

Malcolm G. Powrie, Vernes F. Grafstrom, Textura, Limited and Fenestra Fabrics, Inc. purposely concealed and fraudulently misstated material facts about Textura's financial condition for the purpose of inducing the extension of credit, advertising rebates and the delivery of fiber glass

fabric from Clark-Schwebel and from other suppliers, creditors, and factors.

The defendants on this counterclaim realized that in order to obtain credit they had to present a picture of financial solvency and credit responsibility to all of Textura's suppliers, factors, and creditors. Defendants on the counterclaim knew, however, that the same representations and financial statements did not have to be presented to each individual creditor, factor and supplier as it is common knowledge that credit information is centrally maintained by credit bureaus, which acquire credit information from creditors, factors, and suppliers for use by businesses in evaluating the financial responsibility of a debtor such as Textura. Malcolm G. Powrie also made it a practice of informing his creditors of his credit relations with his suppliers and factors and invited them to check on the accuracy of the information he provided. Defendants on the counterclaim also knew that it was a practice, although infrequent, for various suppliers and creditors to exchange current credit information on their customers, debtors, and clients including, but not limited to, Textura. This is a normal custom of business and essential to the maintenance of commercial intercourse. Defendants also knew that specific credit information was generally not exchanged among creditors and suppliers, but only general comments as to whether the credit was excellent, satisfactory, or unsatisfactory. Knowing these business practices, defendants on the counterclaim set about to be sure that

Textura conveyed a picture of prosperity by which its credit rating among suppliers, factors, and creditors would always be maintained at a satisfactory or excellent level. This was done at a time when they knew that if the information which they concealed were made known, they would be unable to obtain credit from their creditors, factors, or suppliers. With this in mind they did the acts hereinafter mentioned.

Since the start of this law suit, Clark-Schwebel has learned from the discovery that many of these acts were particularly directed against L. F. Dommerich & Co. to induce Dommerich to remain as Textura's factor. Powrie knew that his business depended upon having a factor who would convert Textura's receivables into cash. Powrie also knew that other creditors and suppliers in their extensions of credit to Textura relied upon the fact that Textura had a factor. Knowing this, on many occasions Powrie would discuss his factoring arrangements with Clark-Schwebel and assure it of Textura's satisfactory relations with Dommerich. He also invited Clark-Schwebel to verify these relations.

Since the commencement of discovery, Clark-Schwebel has learned that the conspiracy complained of herein extended beyond obtaining credit for Textura and included an intentional and purposeful plan practiced upon all of Textura's creditors in 1966 to prevent them from obtaining satisfaction on credit previously extended by them to Textura. This was perpertrated when it became evident to Powrie and Grafstrom that Textura's financial position was, at best, precarious due to Powrie's and Grafstrom's acts complained of herein. Powrie and Grafstrom established a program to salvage their

own personal financial positions to the detriment and fraud of their creditors. Specifically, in or about October or November 1966 when, as Irene Sharpe put it, "It was [only] a matter of time", Powrie and Grafstrom caused to be transferred to themselves the shares of Fenestra Fabrics, Inc. for $.00. This was at a time when Fenestra allegedly had $500,000 in contracts with an alleged profit of $50,000. If plaintiff's allegations are true as to the profit potentiality of Fenestra, then their transfer of this asset, which was backdated to August 1, 1966 to avoid any preference in bankruptcy, was clearly a fraud upon creditors and to prevent the creditors from obtaining satisfaction of their outstanding obligations. At no time did Powrie or Grafstrom inform Textura's creditors of the transfer and in fact on October 9, 1966 Powrie wrote a letter on Textura stationary which implied that Fenestra was still a wholly owned subsidiary of Textura.

Moreover, in or about October or November, 1970, Powrie cancelled personal indebtedness in the amount of $11,832 owed by him to Textura. This too was backdated to August 1, 1966. As Irene Sharpe said referring to this transaction:

> "A. You've got to realize that we were closing this thing up at this time. We knew it was a matter of time and we were trying to clean all these things up...
>
> Q. And this is October?
>
> A. Yes." (Sharpe Trans. pp. 44-45)

As part of the conspiracy to defraud Textura's creditors and prevent them from obtaining satisfaction on their obligations from Textura, Powrie first treated this cancellation

of indebtedness on the corporate books as income to himself knowing that if he treated it any other way, he would have a voidable preference in bankruptcy and Textura's creditors could recover this money from him. He thereafter represented to the creditors and trustees that this was income to him. However, in April 1967 to avoid income taxes, when he filed his income tax returns, Powrie treated this as an offset against an outstanding obligation between Textura and L. F. Dommerich & Co. Had this been so treated originally, the cancellation of indebtedness would be a voidable preference in bankruptcy and Powrie would clearly be indebted to the estate of the corporation for the full amount of $11,832, which in turn would inure to the benefit of its creditors. At no time did Powrie disclose the fact that he no longer considered this money income, but indicated it as a return against an indebtedness. This was surrepticiously done and purposely concealed from the Trustee and Textura's creditors to prevent the recapture of these funds for the benefit of creditors.

The foregoing are but two examples of the continuation of this fraud against creditors beyond the initial representations for the inducement of such credit. There are many other examples of this continuing fraud on creditors.

QUESTION

1. (b) Identify each of the TEXTURA and FENESTRA employees referred to.

ANSWER

Irene Sharpe and other persons who performed the bookkeeping functions for Textura Limited and Fenestra Fabrics

aided and abetted the conspirators and participated in the conspiracy referred to herein. In addition there may be others unknown to Clark-Schwebel who aided and abetted the conspirators in furtherance of these acts.

QUESTION

1. (c) State the facts upon which the allegation is based that the acts referred to were done knowingly, with intention to deceive, and for the personal gain and financial benefit of FENESTRA, TEXTURA, POWRIE and GRAFSTROM, and, with respect to each, describe the nature of the personal and financial benefit sought and/or received.

ANSWER

The acts referred to herein were done knowingly with the intention to deceive. Malcolm G. Powrie has testified that he directed the inclusion of unearned revenue from uncompleted work and sales (for which work had not even been started) in the monthly gross sales. He stated that this was done to show an average monthly sales figure of $150,000 in the year of 1966 as he had forecast. Powrie knew that Textura's sales did not fulfill his projections, but he nevertheless represented it did for the purpose of conveying the impression that Textura was meeting its projections and that it was financially able to meet its obligations.

In early July, 1966 Powrie met with Berman, a partner in Textura's auditors. Powrie was advised by Berman that unless he made certain corrections and adjustments in the books, and financial statements of Textura, Berman would not issue the report for the June, 1966 quarter. Berman informed Powrie that failure to correct the June statements for Textura and to adjust the books would be dishonest. Powrie refused to do this and Berman never approved or issued the

June '66 quarterly statement. Powrie was fully aware that the financial statements were misleading and inaccurate.

Grafstrom testified that at a meeting with Messrs. Schwebel and Nordheim of Clark-Schwebel on or about July 29, 1966, he and Powrie knew that they would be unable to and would not meet any commitments they made for the settlement of an arbitration proceeding commenced by Clark-Schwebel against Powrie and that the sole purpose of making the representations as to Textura's financial position and their willingness to make the settlement was to obtain fiber glass fabrics and credit from Clark-Schwebel. (Grafstrom Trans. pp. 190-192). It was at this meeting that Powrie gave Clark-Schwebel a copy of the June 1966 Textura financial statement which he knew to be false and fraudulent and which included the sales Berman had informed him must be taken out of the statement. At no time did Powrie advise Clark-Schwebel that the statement he presented to them was considered false by his accountants or that the accountants refused to issue the June quarterly statement because of the falsified sales figures which were knowingly included in the statement presented to Clark-Schwebel.

As early as October 20, 1964 Grafstrom expressed doubt to Powrie as to the ability of Textura to reach his "very optimistic" projections, which Grafstrom later learned were never met nor ever came close to being met. Nevertheless, by failing to object to the statements and by failing to inquire into their preparation and make up, Grafstrom recklessly adopted every projection and financial statement that Powrie ever made and published them by repeating them to third parties either knowing they were false or with reckless disregard for their truth.

In addition to the foregoing, the documents clearly show that Powrie made numerous representations as to sales and revenue, at a time when he knew them to be false or recklessly disregarded the truth of those statements. Compare note on Deposition Exhibit 222. Moreover, on numerous occasions he represented that monies would be paid shortly or had recently been paid on outstanding bills owed by Textura when he knew such payment had not been made, would not be made, and could not be made because of Textura's perennial shortage of cash caused by his use of corporate assets. See e.g. Burlington Exhibits 104 and 107 and Clark-Schwebel Exhibits 27 and 43.

On numerous occasions Powrie represented facts about Textura's operation which he knew to be false. On or about December 22, 1965 he informed Nordheim of Clark-Schwebel that Textura has never paid interest to suppliers on overdue amounts when he knew that it was Textura's custom to pay such interest. See e.g. Stevens Exhibit 10. In addition Textura had repeatedly paid interest to the factors of suppliers from whom he purchased goods because he did not pay within the 30-day terms of his purchase agreements.

This was done for the personal and financial benefit of Grafstrom and Powrie to permit them to obtain a return on their investments in Textura and to permit Powrie in particular to continue to enjoy an extremely favorable salary and fringe benefits from the operations of Textura Limited and Fenestra Fabrics. Textura engaged in these activities and condoned and authorized them so that it could continue in business. Fenestra participated in these activities and condoned and acquiesced in them to continue its extremely

favorable arrangement with Textura whereby Textura paid Fenestra's overhead and expenses.

QUESTION

2. With respect to Paragraph 15 of the Answer:

(a) State the facts upon which the allegation is based that all of the acts complained of were done with the knowledge and belief that the representations made were not true and correct or with reckless disregard for the truth and were done for the purpose of inducing sales of fiber glass fabrics to TEXTURA and obtaining credit;

ANSWER

See Clark-Schwebel response to questions 1(c) and 2(b).

QUESTION

2. (b) State the facts upon which the allegation is based that the co-conspirators knew that if they had correctly stated TEXTURA'S financial condition and disclosed material facts affecting its solvency, they would have been unable to obtain credits or rebates for advertising for TEXTURA;

ANSWER

Had Messrs. Powrie and Grafstrom, acting both on their own behalf and on behalf of Textura and Fenestra, stated the true financial picture of Textura and Fenestra, they would have demonstrated that Textura was hopelessly insolvent, could not pay its bills, and was incapable of earning money under Powrie's direction because of his personal use of corporate assets hereinafter described. In addition, had the true financial position of Textura been shown, Clark-Schwebel would have learned that Malcolm G.

Powrie was diverting substantial corporate assets which were needed to pay existing corporate obligations. Had Clark-Schwebel known the true financial position of Textura, it would not have extended any credit to Textura and would not have given Textura any cash rebates for advertising.

Grafstrom and Powrie were aware of this common fact of business life. In fact Grafstrom testified that they knew that if they had not made the representations about Textura's ability to pay its obligations they made to Clark-Schwebel on or about July 29, 1966, they would have received neither credit nor goods.

QUESTION

2. (c) With respect to (a) and (b) above, identify each alleged co-conspirator as to whom such allegations are made.

ANSWER

2. (c) Malcolm G. Powrie, Vernes Grafstrom and Irene Sharpe.

QUESTION

3. With respect to Paragraph 16 (a) of the Answer:

(a) Identify each allegedly inaccurate book of account and financial record of TEXTURA and FENESTRA referred to.

ANSWER

3. (a) All Textura and Fenestra ledgers and journals for the years 1964, 1965 and 1966. In particular the following:

Exhibit 250 Supplier ledger sheets plus six miscellaneous sheets dated 1965-1966,

Exhibit 251 Fenestra 1965 Ledger and Sales Journal and 1966 Ledger and Sales Journal,

Exhibit 252 Textura General Ledger for 1966,

Exhibit 253 Textura 1966 Sales and General Journal,

Exhibit 254 Cash Receipts, Textura 1966,

Exhibit 255 Textura Cash Disbursements and Purchase Journal for 1966.

QUESTION

3. (b) With respect to each such book and record, specify each inaccuracy claimed.

ANSWER

3. (b) The books were inaccurate in the following manner:

(i) They maintained inconsistent cut off dates for reporting of monthly sales;

(ii) They failed to accrue expenses against sales not yet completed or started yet included in income;

(iii) They failed to properly reflect inventory control and actual usable inventory on hand by frequently overstating inventory; e.g. The October 31, 1966 statement and the December 13, 1966 statement showed an inventory difference of $125,000. The average inventory use was $55,000 a month, considerably less than what was used during this period as reflected in the statements of Textura. Powrie is unable to account for this inventory shortage;

(iv) They maintained inadequate reserves for bad debts;

(v) They omitted expenses from the appropriate accounts even though bills had been submitted and were in Textura's possession; e.g. As of June 30, 1966 there were over $22,000 in unrecorded expenses omitted from the books;

(vi) They improperly included in income work not yet completed or started;

(vii) They failed to write off expenses incurred;

(viii) They improperly capitalizated expenses;

(ix) They failed to write off debts which Textura knew were uncollectible;

(x) They failed to write off damaged inventory;

(xi) They failed to record expenses in the periods for which the expenses occurred.

(xii) They failed to show an outstanding liability in the amount of $122,267.41 which was created on September 16, 1964 but which was never reflected in the books.

QUESTION

3. (c) State the facts upon which the allegation is based that such inaccurate books and records were knowingly maintained, including, without limitation:

(i) the identity of each person as to whom such knowledge is claimed; and

(ii) as to each such person, the specific inaccuracies of which he is alleged to have had knowledge.

3. (c) (i) Malcolm G. Powrie, Irene Sharpe and Vernes Grafstrom.

(ii) These individuals either had personal knowledge of each inaccuracy or as a result of the conspiracy, the knowledge of each is imputed to them. See also Answer 1. (c).

On or about July 15, 1966 Malcolm G. Powrie was informed by his outside public accountant, William Berman, that the practices Powrie was authorizing for Textura were improper and dishonest. Irene Sharpe has testified that Berman told them to reverse out of the books uncompleted and not yet started work. In particular the Del Webb Santa Monica Shores job, which had been included in income for the full amount of the job -- $68,000 -- even though no work was done on the job or expenses incurred for it, was to be reversed out. Although Textura was advised to remove uncompleted sales from income, Powrie refused to do so and they were never reversed out of the books and sales figures. At his deposition Zimmerman admitted that if the Del Webb job had not been reversed out of the books, they would have been improperly kept and the financial statements misleading and improper. (Zimmerman, Trans. pp. 81 and 112) Powrie also knew this as a result of Berman's refusal to issue the June statements. Nevertheless, he still issued statements for June through October for Textura which included these prebilled items knowing they were deceptively misleading. At no time did Powrie disclose this to his creditors.

QUESTION

4. With respect to Paragraph 16(b) of the Answer:

(a) Identify each allegedly false and misleading financial statement referred to.

ANSWER

Each financial statement prepared by the firm of Wilheim, Zimmerman and Berman for the years 1964, 1965 and 1966 and each internal financial statement prepared by Textura on a monthly basis in 1965 and 1966 were false and misleading.

QUESTION

4. (b) State in what respects each such statement was false and misleading;

(c) State in what respects each monthly and quarterly financial statement overstated TEXTURA's income, net worth and working capital, including, without limitation, the amount of each such overstatement and the basis on which it is claimed to be an overstatement.

ANSWER

4. (b) and (c) These statements were false and misleading as follows:

(i) Inclusion in income of sales not completed or started.

(ii) The non-disclosure of the inclusion in income of sales not completed or started.

(iii) Failure to accrue expenses against sales not completed or started.

(iv) The non-disclosure of the failure to accrue expenses against sales not completed or started.

(v) Inclusion of pre-billed items in income for their full amount.

(vi) The non-disclosure of inclusion of pre-billed items in income for their full amount.

(vii) Failure to use a consistent cutoff period for sales to be included in income.

(viii) The non-disclosure of the failure to use a consistent cutoff period for sales to be included in income.

(ix) The statements are also inaccurate and misleading for each of the items specified in answer to Question 3(b) above.

(x) The inclusion in current assets of amounts due from employees which were uncollectible, which tended to overstate working capital, income and net worth.

(xi) The non-disclosure of the inclusion in current assets of amounts due from employees which were uncollectible, and which tended to overstate working capital, income and net worth.

(xii) The inclusion in "Amounts due from Factor" of amounts which the Factor did not owe.

(xiii) The non-disclosure of the inclusion in "Amounts due from Factor" of amounts which the Factor did not owe.

(xiv) The carrying of good will on the balance sheet.

(xv) The failure to write off the Mo-Vac process; the non-disclosure that Textura considered the Mo-Vac process worthless.

(xvi) The failure to write off expenses.

(xvii) The improper capitalizing of current expenses.

(xviii) The failure to disclose that expenses were capitalized.

(xix) The failure to disclose that the statements were not prepared in accordance with generally accepted accounting principals (See testimony of Zimmerman).

(xx) The use of improper and inconsistent cut-off dates for inclusion of income; and the failure to disclose same.

(xxi) The failure to show an outstanding obligation of Textura's created on September 16, 1964 in the amount of $122,267.41 and on which Textura remained obligated until October 24, 1968.

(xxii) The failure to disclose that the statements did not accurately reflect what was on the books of account of Textura.

Each of these items materially affected and distorted the net worth, net income, and working capital of Textura. For example, the June 1966 financial statement of Textura was overstated by at least the following amounts:

> Income - $105,000 [Instead of a $75,000 profit there was a loss of at least ($30,000)]
> Net worth - $410,000 [Instead of a net worth of $417,768 Textura had a net worth of no more than $7,000.]
> Working Capital - $110,000 [Instead of a working capital of $46,000 Textura had a deficit working capital of ($64,000)]

The foregoing items resulted in overstatements because the financial statements improperly included items for which Textura had no legal right, included as capital items expenses, and failed to accurately reflect all transactions

entered into by Textura. Moreover, the statements were misleading because they did not adhere to generally accepted accounting principles consistently applied.

A comparison of the November 1965 and December 1966 statements for Textura reveals further discrepancies and inaccuracies. The December statement showed a loss of $42,000 for that month compared to purported profits for the 11 preceding months. Zimmerman has testified this is a substantial and material discrepancy. It was caused by, among other things, Textura's faulty bookkeeping and improper inventory records.

QUESTION

4. (d) Identify each person alleged to be responsible for the preparation of each such statement.

ANSWER

4. (d) Messrs. Wilheim, Zimmerman and Berman, Malcolm G. Powrie, Irene Sharpe, and Vernes F. Grafstrom.

QUESTION

5. With respect to Paragraph 16(c) of the Answer:

(a) State by and to whom each such financial statement or the information contained therein was distributed; and

(b) Describe the manner, time and place of each such distribution of each such financial statement or the information contained therein.

ANSWER

5. (a-b) The financial statements were primarily distributed by Malcolm G. Powrie or members of the Textura staff pursuant to Powrie's authorization and instructions. Clark-Schwebel believes that Irene Sharpe and Messrs. Wilheim,

Zimmerman and Berman distributed copies of these various statements pursuant to Mr. Powrie's authorization. Clark-Schwebel is not aware of the names of other individuals who might have distributed these documents. Clark-Schwebel does not know of any instance where Grafstrom personally distributed the financial statements. However, Vernes Grafstrom orally disseminated information from these statements.

Since commencement of this lawsuit, Clark-Schwebel has learned from the discovery that in addition to Clark-Schwebel these statements were distributed at various times to L. F. Dommerich & Co., Burlington Industries Inc., J. P. Stevens & Co., United Factors, and other creditors unknown to Clark-Schwebel as part of the conspiracy to fraudulently induce credit for Textura. This was part of the program of establishing a false picture of credit worthiness among Textura's creditors and suppliers.

Distribution was made either by mail or by personal delivery by Malcolm G. Powrie or one of his agents acting at his direction. Delivery took place in Los Angeles, New York, and other places. Clark-Schwebel has learned since the start of discovery in this lawsuit that Mr. L. F. Donnelly of Burlington would occasionally pick up copies of the financial statements at the Textura offices. Distribution of these statements took place during the period 1964 to 1966.

The failure to distribute statements by Powrie is equally significant. In the spring of 1966 Powrie purposely did not distribute the year-end 1965 statement which showed a substantial loss for the month of December, 1965 and which showed that Textura failed to come close to meeting its projections for 1965. Powrie either did not send creditors these statements or sent them only if they were

requested and then after the false and fraudulent 1966 statements had been prepared and were either previously or contemporaneously provided to the creditors. See e.g., testimony of E. W. Schulz. (Schulz trans. pp. 119-120.)

QUESTION

6. With respect to Paragraph 16(d) of the Answer:

(a) Identify each allegedly false and misleading financial projection referred to.

ANSWER

6. (a) The financial projections referred to in paragraph 16(d) of the counterclaim are as follows:

1. Projections for the period 1964-1967. See Exhibit 396.

2. Textura six month projections through December 31, 1964. See Exhibit 411.

3. The year-end 1964 projections. See Exhibit 348.

4. The Projections for 1965. See Exhibits 367, 369, 382 and 449.

5. The 1966 projections. See Exhibits 241, 244, 371, and 451.

6. Each monthly internal financial statement for 1965 and 1966 can be considered projections.

7. Various oral statements made by Powrie.

QUESTION

6. (b) State in what respects each such projection was false and misleading.

(c) State in what respects each such projection overstated anticipated sales, revenues, and income and understated expenses, including, without limitation, the amount of each such overstatement and the basis on which it is claimed to be an overstatement.

ANSWER

6. (b-c) The projections were false and misleading by

(i) overestimating the sales of Textura. For example, the 1966 projections were based on average monthly sales of $150,000. Powrie knew that such a sales volume could not be consistently maintained.

(ii) estimating that a gross profit of 37 1/2% and a 10% net profit could be achieved on their sales volume. Based on the prior business experience of Textura, Powrie knew or should have known that Textura could not achieve 37 1/2% gross profit on any sales volume, that a net profit of 10% on $150,000 in gross monthly sales was impossible, and that Textura had not made a gross profit of 37 1/2% in either 1964 or 1965. In fact the first financial projections for 1966 prepared by Allan Friedman showed that $150,000 in monthly sales was the break even point.

(iii) The projections failed to properly account for all expenses. For example, the 1964 projection (See Exhibit 348) was materially false because it failed to take into account the 5% gross sales commission which Powrie generously provided himself and about which he failed to inform Zimmerman (see Exhibit 342).

(iv) The 1966 projections were inaccurate in that they underestimated:

(A) factoring costs by $2,000 a month,

(B) auto and truck expense by $1,000 a month,

(C) officer salaries for Powrie by $20,000,

(D) bad debt expense by $3,000,

(E) telephone expense,

(F) advertising by $20,000,

(G) general operating expenses by $7,500 a month.

(v) These projections failed to account for inventory control slippage which was common.

(vi) The 1966 projections failed to reflect the fact that salesmen were to be on a commission basis instead of straight salary as represented. See Exhibit 371.

(vii) The 1965 projections (Exhibit 382) were grossly inaccurate. It projected accounts payable of only $183,000 when in fact accounts payable were $329,000; it projected a profit of $41,000 when in fact Textura suffered a loss of $31,000; and it projected retained earnings of $39,700 when it actually had a deficit in retained earnings of $17,700.

(viii) The 1964 projections showed an anticipated loss of $25,000, but the actual loss turned out to be $114,000 (or an $89,000 greater loss).

Messrs. Moscowitz and Schulz of L. F. Dommerich have testified that none of Powrie's financial projections for Textura ever were made.

Powrie failed to reveal that the cost reductions allegedly planned for 1966 were not made or were ineffective thus materially contributing to the erroneous projections. Moreover, during 1966 Powrie never revealed he was falling short of the $150,000 monthly sales projected, and in fact fraudulently represented that he was meeting the projections.

QUESTION

6. (d) Identify each person alleged to be responsible for the preparation of each such projection.

ANSWER

Malcolm G. Powrie and Vernes F. Grafstrom were responsible for the preparation of these projections. Work was delegated to others to do the actual putting together of the statements based on materials provided or made available to them by Powrie. These included Miss Sharpe, Allan Friedman, and Messrs. Wilheim, Zimmerman and Berman.

QUESTION

7. With respect to Paragraph 16(e) of the Answer:

(a) State by and to whom each such financial projection or the information contained therein was distributed, and

(b) Describe the manner, time and place of each such distribution of each such financial projection or the information contained therein.

ANSWER

7. (a-b) The financial projections were primarily distributed by Malcolm G. Powrie or members of the Textura staff pursuant to Powrie's authorization. They were either oral or written predictions. Clark-Schwebel believes that Irene Sharpe and Messrs. Wilheim, Zimmerman and Berman distributed copies of these various statements pursuant to Mr. Powrie's authorization. Allan Friedman distributed copies of the 1965 projections (Exhibit 239). Clark-Schwebel is not aware of the names of other individuals who might have distributed these documents.

Since the start of this lawsuit Clark-Schwebel has learned from the discovery that in addition to it, these statements were distributed at various times to L. F. Dommerech & Co., Burlington Industries Inc. and J. P. Stevens

& Co. and other creditors unknown to Clark-Schwebel as part of the conspiracy to fraudulently induce credit for Textura.

Distribution was made either by mail or by personal delivery by Malcolm G. Powrie or one of his agents acting at his direction to the above named parties. Since the start of this lawsuit Clark-Schwebel has learned from the discovery that Mr. Donnelly of Burlington would occasionally pick up copies of the financial statements at the Textura offices. Distribution of these statements took place during the period 1964 to 1966..

In addition to the printed copies of the financial projections, Powrie either personally or through his agents and employees at his direction, made oral representations as to Textura's income, sales, net worth, etc. See, e.g., Exhibits 367, 369.

QUESTION

8. With respect to Paragraph 16(f) of the Answer:

(a) Describe each false representation alleged concerning the financial solvency and ability of TEXTURA to carry on its business in 1965 and 1966, including, without limitation, each alleged overstatement of net worth and working capital and assets.

ANSWER

8. (a) Each of the financial statements prepared during the period 1964-1966 falsely represented the financial solvency of Textura. These are more fully set out in the answers to questions 5, 6 and 7. See also 9(a).

In addition, since the start of this lawsuit Clark-Schwebel has learned from the discovery that Grafstrom and Powrie made numerous oral representations in April, July, September, and October 1970 to representatives of the mills

concerning the ability of Textura to carry on its business and to pay its outstanding obligations. False representations were also made as to the volume of Textura's current sales at that time.

On July 29, 1966 Powrie and Grafstrom falsely represented that they could pay a settlement on an outstanding arbitration claim with Clark-Schwebel when they knew that they were unable to pay the monies agreed upon and only agreed to the settlement so they could obtain credit from the mills and further shipment of goods. This was done to fraudulently induce the settlement of Textura's arbitration claim. These representations were repeated in August, September, October and November 1966 to prevent Clark-Schwebel from reinstituting the arbitration.

False representations as to Textura's solvency continued through 1966. See, e.g., Burlington Exhibits 103 and 104.

QUESTION

8. (b) State by and to whom each such representation was allegedly made, identifying each person involved together with the date or dates and place or places.

ANSWER

8. (b) See answers to 8(a), 5(b) and 7(b). In addition to the foregoing Clark-Schwebel has learned since the start of this lawsuit through discovery that, Messrs. Powrie and Grafstrom met separately and at various times with Messrs. Schwebel, Nordheim, Binnie, Knissel, Hornickel, Moscowitz, Donnelly and others in New York and Los Angeles

during 1966. At each such meeting Powrie and/or Crafstrom falsely and intentionally misrepresented Textura's financial ability to carry on business.

QUESTION

9. With respect to Paragraph 16(g) of the Answer:

(a) State and describe each material fact which it is claimed was not disclosed, and state in what respects there was a failure to disclose each such fact.

ANSWER

9. (a) The following material facts affecting Textura's ability to carry on business and its credit standing were never disclosed by Powrie and Grafstrom and were purposely concealed by them.

(i) Textura never achieved any of its financial projections during the period 1964-1966.

(ii) The indebtedness carried on the books of the corporation from employees was money owed by Powrie and there was no reasonable expectation of repayment.

(iii) The indebtedness on the books of the corporation due from employees was cancelled without any consideration therefor.

(iv) The profit and loss statements included revenue from uncompleted work against which no expenses or insufficient expenses had been charged.

(v) William Berman of the accounting firm of Wilheim, Zimmerman, & Berman refused to issue the June 1966 Textura Statement because of substantial irregularities in the bookkeeping of Textura and because of false financial records.

(vi) The Fenestra Stock was distributed to two of the Shareholders of Textura [Messrs. Powrie and Grafstrom] for insufficient consideration.

(vii) In October 1966 Textura and Powrie impliedly represented to the Mills that Textura still owned Fenestra and that Textura would have available all of Fenestra's income.

(viii) Other suppliers and creditors refused to deliver goods to Textura for non-payment of bills of Textura during the years 1965-1966; in fact, Powrie expressly represented to the contrary to the mills and L. F. Dommerich.

(ix) Fenestra was unable to repay the monies owed Textura and carried on the books of Textura as a current accounts receivable.

(x) Textura did not make in 1964, 1965 and 1966 (nor could it possibly make) 37 1/2% in gross profit on its sales.

(xi) Textura was factoring accounts receivable which it had not yet earned and was not entitled to factor.

(xii) Textura's financial statements were not prepared in accordance with generally accepted accounting principles consistently applied.

(xiii) Textura had agreed in June 1966 to repurchase the capital stock of Textura owned by Howard Porter.

(xiv) All expenses were not recorded on the Textura ledgers and journal.

(xv) Textura was paying personal expenses of Powrie.

(xvi) Powrie was allegedly drawing a commission on sales when he was supposed to be on straight salary and that he drew money from Textura above his salary entitlements whenever he needed it.

(xvii) The inventory valuation for the year-end 1965 was false.

(xviii) Powrie concealed assets from creditors and made false statements about personal transactions between himself and Textura to the detriment of Textura's creditors.

(xix) See also answers to Questions 5 through 8.

(xxx) The inventory records for 1966 overstated inventory.

(xxxi) There were inadequate inventory controls in 1964 through 1966.

(xxxii) That Textura was obligated on a deed of Trust executed on September 16, 1964 in the amount of $122,267.41 and that Textura remained obligated on that Deed of Trust until October 24, 1968.

QUESTION

9. (b) Identify each alleged failure of TEXTURA to meet revenue and income projections and state in what respect there was a failure to disclose same.

ANSWER

9. (b) Each of the financial projections enumerated in answer to 6(a) was not met. The actual figures for those periods bore no resemblance to the projection. See the testimony of E. W. Schulz and L. M. Moscowitz of L. F. Dommerich for specific examples. See also Exhibit 353. Powrie never disclosed to Clark-Schwebel Textura's repeated failure to achieve the financial projections predicted. With each new financial projection there was an implied representation that Textura had lived up to its financial projections of the past. In July, 1966 Powrie and Grafstrom represented that Textura was meeting its projected monthly sales of

$150,000 a month and 10% alleged net profit when Powrie (and presumably Grafstrom) knew that Textura was only able to reach these sales figures by the juggling of Textura's books and by the inclusion of unearned revenues and the exclusion of incurred expenses or deferral of expenses presently incurred.

QUESTION

9. (c) Identify, including names, dates and places, each refusal alleged of other suppliers to sell and/or deliver goods to TEXTURA for reasons of its alleged non-payment of bills in 1965 and 1966, and state in what respects there was a failure to disclose same.

ANSWER

9. (c) Defendants do not have a complete list of these as of this time as plaintiffs have still not answered interrogatories, Set IV, which contains some of this information.

QUESTION

10. With respect to Paragraph 16(h) of the Answer:

(a) State each fact upon which the allegations are based that there was a deliberate creation of a false illusion of financial support for TEXTURA by POWRIE and GRAFSTROM, and that such support was not intended.

(b) Describe each instances or occasion on which GRAFSTROM AND POWRIE were presented as men of substantial personal worth who were supporting and would continue to support TEXTURA and, without limitation.

(i) State the date or dates and place or places of each such presentation;

(ii) Identify the person or persons by whom such presentations were allegedly made and received;

(iii) State whether each such alleged presentation was oral or in writing; if oral, state the substance thereof, and, if in writing identify such document constituting, relating or referring to each such presentation.

ANSWER

10. (a-b) Since the start of this lawsuit Clark-Schwebel has learned from the discovery that on more than one occasion Malcolm G. Powrie represented to the mills and L. F. Dommerich & Co. that he was a man of substantial worth and was supporting the Company. See Exhibit 406. In addition, he represented that V. F. Grafstrom was a wealthy international business man who had provided substantial sums of money for Textura's operation. In May or June 1965 Powrie informed the mills and L. F. Dommerich that Grafstrom had made another contribution to capital by cancelling indebtedness owed him by Textura. Powrie also implied by the manner of his presentations to his creditors and the occasional presence of V. F. Grafstrom at times of particular financial crises that both would support Textura. In addition Powrie made numerous representations to L. F. Dommerich which Powrie repeated to others that more capital would be put in Textura. In 1965 Powrie promised a total of $50,000 would be put into the company's capital by the principals. Only $30,000 was put in.

The fact that they did not intend to do this is shown by their testimony before trial, the diversion of corporate assets in 1965 and 1966, and their refusal to provide personal financial support for Textura with cash or personal guarantees after July 1966.

QUESTION

10. (c) Describe each instance or occasion on which personal guarantees were allegedly promised and were not forthcoming in 1966 and, without limitation:

(i) State the date or dates and place or places of each such promise;

(ii) Identify the person or persons by and to whom each such promise was made;

(iii) State whether each such promise was oral or in writing; if oral, state the substance thereof, and, if in writing identify each document constituting, relating or referring to each such promise.

ANSWER

10. (c) Personal guarantees were promised to L. F. Dommerich in 1965 but were not immediately forthcoming. (See testimony of L. M. Moscowitz, W. C. Hornickel, and E. W. Schulz.

QUESTION

11. With respect to Paragraph 16(i) of the Answer:

(a) Identify each transaction between TEXTURA and its corporate officers, directors and employees which it claimed were not fairly disclosed.

ANSWER

11. (a) The following transactions were not fairly disclosed:

(1) The sale of the Landfair Apartments to Powrie.

(2) The sale of the Olympic & Bundy Apartments to Powrie.

(3) The sale of Fenestra Fabrics Stock.

(4) The exchange of Glass Fabrics for cash from Textura by Powrie.

(5) The repurchase of Textura and Glass Fabric stock out of capital during the period 1960-1966.

(6) The cancelation of corporate indebtedness in 1966.

(7) The payment of the mortgage on Powrie's beach trailer in 1966.

(8) The non-disclosure of the extent of Powrie's compensation arrangements.

(9) The ultimate sale of the Mo-Vac process to Textura.

(10) The payment of Powrie's personal expenses by Textura.

(11) The personal real estate dealings of Malcolm G. Powrie.

QUESTION

11. (b) State in what respects there was not fair disclosure of each such transaction as alleged;

(c) State in what respects each such transaction was adverse to TEXTURA's interests and contributed to its insolvency; and

(d) Unless already included in defendant's answers to the foregoing, state all of the same facts with respect to each transaction specifically referred to in Paragraph 16(i) of the Answer.

ANSWER

11. (b-d) There was either no disclosure of any of the foregoing practices or they were presented in such a manner as to prevent any understanding of the import of the transactions on the ability of Textura to carry on its business. For example, no disclosure was made of the cancelation of Powrie's indebtedness to Textura in 1966 at a time when Textura was in need of funds to pay off obligations to its creditors. Had these funds been paid off instead of

being canceled without any consideration, Textura would have been able to meet some of its obligations.

The "sale" of the Olympic and Bundy Real estate to Powrie was not fairly disclosed. The property was originally purchased in 1964 for approximately $57,950; and not $50,000 as Powrie falsely represented to the assignee for creditors in 1966. The building was paid for by a cash payment of $10,000 and two mortgages making up the balance. The building was depreciated approximately $7,500 from the time it was acquired until it was sold to Powrie sometime in December 1965 or January 1966. The building, according to Mr. Powrie's testimony was sold to him for the original cash cost less net depreciation. It appears from the records available that this transaction did not account for the payments made by Textura against the mortgage from the time of acquisition through the time of sale to Powrie thus giving Powrie a personal financial gain at Textura's expense.

Moreover, it is apparent at the time of transfer to Powrie the property was worth considerably more than the original purchase price. In November 1966, less than a year from the date Powrie "purchased" the Olympic apartment from Textura, he sold the building for $63,000 making a profit of approximately $13,000. Powrie "purchased" the building from Textura by giving a $5,500 note. One month after he sold the building and when the assignment for the benefit of creditors was made, Powrie still owed in excess of $2,500 on this note even though he had received over $20,000 in cash on the sale of the building in November 1966.

Aside from the obvious loss of much needed capital which Textura could have had if it had sold Olympic & Bundy

in an arms-length transaction, Textura lost a source of positive cash flow for the year 1966. Instead of having a building that was generating a positive annual cash flow of $6,279.60 in 1965, Textura only had a note for $5,500 of which only $3,000 was paid off by the year end. This self dealing of Powrie effectively denied the company of over $16,000 of net cash during 1966 - a time when it was in desparate need of cash to meet creditor' obligations.

The prior transaction with the Landfair apartment was of a similar nature. Here Powrie effectively transferred a worthless process - Mo Vac - to Textura for the Landfair building. In 1965 Landfair generated a positive cash flow of $17,302.06. And in 1969, when the property was sold, Powrie made a personal profit of $52,096 on the transaction. Had these transactions been dealt with at arms-length, the additional available funds to Textura would have contributed to its financial solvency.

The cancelation of indebtedness owed by Malcolm G. Powrie and Robert L. Johnstone in 1966 in the amount of $19,828.70 without consideration was a substantial contributing factor to Textura's insolvency. These obligations had been carried as non-interest bearing loans on the Textura books since at least 1964. The debt should have borne interest at a 6% rate thus generating at least $1,200 more a year in revenue for Textura. Moreover, the loan of these funds decreased Textura's actual net working capital and injured its ability to meet current obligations.

Commencing in January 1966 Textura paid Powrie's mortgage on his beach cottage. These funds, in the amount of

$250 a month, should have been used to pay creditor obligations. Moreover, there was a complete failure to disclose this personal transaction.

The sale of Fenestra's stock to Powrie and Grafstrom in 1966 was not disclosed at all. Here Powrie and Grafstrom acquired the 100% stock interest in Fenestra for $500. At that time, Fenestra allegedly had $500,000 in future sales contracts and was allegedly capable of earning a 10% profit on this or $50,000 net a year. If plaintiffs' claim as to Fenestra's financial ability is correct, then the sale of Fenestra was a fraud upon creditors. Moreover, the sale of Fenestra denied Textura a substantial source of cash flow and saddled Textura with a disproportionate share of overhead and administrative expenses. The failure to allocate any of these "G & A" expenses to Fenestra once it ceased to be a Textura subsidiary was a further fraud upon creditors and a contributing factor to its insolvency.

The repurchase of Howard Porter's Textura stock for $6,000 in June/July 1966 by the corporation for the personal benefit of Grafstrom and Powrie was a substantial contributing factor to Textura's inability to meet creditor payments, since it depleted much needed cash. There was no disclosure of this transaction.

Equally, Powrie's drawing funds from the company whenever he felt he needed money, was detrimental to Textura's ability to carry on business. In 1966 Powrie testified he drew over $20,000 above his prior indicated salary. Most of this was drawn in the last six months of 1966 when Textura's financial position was most precarious. This was not disclosed. In fact, it had been represented

that Powrie's 1966 salary was to be $30,000. In point of fact he testified that he drew over $50,000 in salary.

In or about December 1964, Powrie owned 96% of the outstanding shares of Glass Fabrics and the distribution rights for Mo-Vac International in the United States. Powrie knew or had reason to know that these distribution rights and his interest in Glass Fabrics were worthless or were of minimal value. To enrich himself at the expense of Textura's creditors, Powrie embarked upon a plan the result of which would have transferred the worthless Mo-Vac process to Textura for its Landfair Apartment building valued at $300,000 and obtain cash for his worthless shares in Glass Fabrics.

The plan embarked upon by Powrie involved a series of step transactions which included liquidation of Glass Fabrics and exchange of its assets and liabilities with Textura for cash. Under this plan, in or about December 1964, Powrie sold a one-third interest in the Mo-Vac process for $50,000 to Porter and Grafstrom. Porter and Grafstrom paid for this interest giving Powrie $50,000 in three personal notes. Powrie thereupon transferred the notes to Textura for the Landfair Apartment building. Textura in turn either gave the notes or their cash equivalent totalling $50,000 back to Glass Fabrics for its assets and liabilities. (Glass Fabrics in turn distributed the notes and cash to its shareholders. Powrie held 96% of the outstanding shares and received over $47,000.) When Textura used these funds to purchase the assets and liabilities of Glass Fabrics, the liabilities of Glass Fabrics exceeded its assets by $20,419.93 and the assets included worthless accounts receivable of $19,828.00. Thus Powrie sold Textura a company insolvent by over

($41,200.00) and received almost $50,000 in cash. Powrie thus liquidated a company, which had a net deficit equity, and received $47,000 in cash and an apartment building worth considerably in excess of that. Textura was left with the excess liabilities of Glass Fabrics and the worthless Mo-Vac process. All of this was done to the detriment of Textura and its creditors and for Powrie's personal financial gain and benefit.

Powrie engaged in numerous transactions using corporate funds for his own personal benefit. In or about 1964 Powrie arranged for Textura to take out a $100,000 whole life insurance policy on his life naming his wife as beneficiary. At the time Powrie was advised by his insurance agent that this would result in personal taxable income to him. The reason for this is that when whole life insurance is paid for by the corporation and the beneficiary is not the corporation but a person designated by the insured, the law considers this a payment of personal expenses by the corporation and accordingly income to that person. Although Powrie was fully advised of this by his insurance agent, he nevertheless failed to report to anyone that Textura was paying his personal expenses or to include these payments of personal expenses in his income as income.

In addition, Powrie used Textura to engage in numerous personal real estate transactions for his own benefit and to the detriment of Textura and Textura's creditors. One such transaction involved what is known as the "Valley" property. At this time defendants still do not know the full scope and extent of this transaction except that at some point in 1964 Textura acquired an interest

in this property to facilitate Powric's personal dealings in real estate. Upon information and belief, Powrie was engaged in numerous real estate transactions with the Goodman's. As a result of this relationship on September 16, 1964 Textura executed a Deed of Trust to G & G Realty Company in the amount of $122,267.41. Textura remained liable on this obligation until October 24, 1968. This was done for Powrie's personal benefit and to aid the Goodman's. At no time was it ever revealed that Textura had this outstanding obligation and potential substantial liability. At no time did Textura receive consideration for guaranteeing this obligation.

Had these transactions not been engaged in or had they been conducted at arms-length, they could have provided Textura with over $150,000 more in working capital during 1966 when these funds were needed. These funds would have permitted Textura to carry on its business. Moreover, had the foregoing information been disclosed to Textura's creditors including Clark-Schwebel, credit would not have been extended because Textura's precarious financial position and Powrie's self-dealings with Textura to Textura's detriment would have been known.

QUESTION

12. With respect to Paragraph 17 through 20, inclusive, of the Answer:

(a) Identify each representation, financial statement, financial projection or other act done upon which defendant allegedly relied in selling fiber glass fabrics, extending credit or giving advertising rebates to TEXTURA.

ANSWER

See answers to questions 1 through 11 of these interrogatories.

Clark-Schwebel was induced to enter into credit transactions with Textura in reliance on the financial statements presented to it and the representations made to it by Powrie and Grafstrom. In addition, since the start of this lawsuit Clark-Schwebel has learned from the discovery that by Powrie's and Grafstrom's practicing this same fraud that they practiced against Clark-Schwebel on other creditors and L. F. Dommerich & Co., an air of financial solvency and well being was created among Textura's suppliers. This was all part of the Powrie's and Grafstrom's plan to induce credit for Textura.

Powrie and Grafstrom purposely distributed these fraudulent and deceptive statements among all of their creditors knowing full well that credit information is routinely exchanged by creditors through direct contact or through credit agencies. By this plan they did not have to individually provide every statement to every creditor or make every oral representation to every creditor; rather all they had to do was systematically disseminate this information among Textura's creditors. In point of fact Clark-Schwebel did not have specific knowledge of many of the individual acts which are set out in these answers. Rather Clark-Schwebel was deceived to believe that Textura was financially solvent and profitable. In furtherance of this Powrie advised Clark-Schwebel of his credit position with the other mills and his factor knowing that he had practiced the same fraud on these mills and factor. Clark-Schwebel acted in reliance on this

false financial picture presented by Powrie and Grafstrom for and on behalf of Textura and Fenestra.

QUESTION

12. (b) Identify and state the amount of each sale of fiber glass fabrics, each extension of credit and each advertising rebate allegedly made or given by defendant to TEXTURA in reliance upon each representation, financial statement, financial projection or other act done as alleged.

ANSWER

12. (b) The credit transactions entered into by Clark-Schwebel in reliance on these false and fraudulent representations are those set out in the Appendix to Clark-Schwebel's answers to Interrogatories Set II. In addition, by use of these fraudulent and deceptive practices Powrie and Grafstrom induced Clark-Schwebel to settle an arbitration proceeding against Textura for terms less favorable than Clark-Schwebel was entitled to and to extend credit to Textura so it could pay the terms of this settlement.

The advertising rebate given in reliance on the false financial status of Textura was in the amount of $5,000. This was to help publish a book on decorative fiber glass fabrics. See Clark-Schwebel Exhibits 91 and 92.

QUESTION

13. With respect to Paragraph 21 of the Answer:

(a) State the facts upon which the allegation is based that defendants to the counterclaim and their co-conspirators concealed their combination and conspiracy to induce the extension of credit and advertising rebates by fraud and deceit.

ANSWER

13. (a) See answers to Questions 1 through 11 hereof.

QUESTION

13. (b) State the facts upon which the allegation is based that it was not until August, 1970 that defendant CLARK-SCHWEBEL had knowledge, or reasonably could have had knowledge, of the alleged combination and conspiracy.

ANSWER

13. (b) Powrie, Grafstrom, Textura and Fenestra concealed the dealings specified herein. Moreover, they made every effort to prevent and hinder Clark-Schwebel from discovering this information. At Powrie's examination before trial in March and April 1970, he indicated no knowledge or gave incorrect information on the matters specified herein. Until Clark-Schwebel was finally able to examine Textura's books and records in August, 1970, it had no knowledge of these transactions.

QUESTION

14. With respect to Paragraph 22 of the Answer, state the manner in which defendant computes damages in the amount of at least $57,132,53 and identify or describe the profits alleged to have been lost.

ANSWER

14. The damages are as follows:

(a) Clark-Schwebel's unpaid invoices totaling $52,132.53.

(b) $5,000 for advertising rebate.

(c) The profits lost by Clark-Schwebel are on the goods that Clark-Schwebel had woven for Textura and which it had to sell at a marked down rate. On the sale to Allergo, Clark-Schwebel lost $11,092.22.

Dated: April 6, 1971
New York, New York

Yours, etc.

WHITE & CASE

By _____
A Member of the Firm
Attorneys for Defendant
CLARK-SCHWEBEL FIBER GLASS
CORPORATION
14 Wall Street
New York, New York 10005
212-732-1040

TO: REGAN, GOLDFARB, POWELL,
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Counterclaim
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& ADLER
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202-298-5900

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON
Attorneys for Defendant
J. P. STEVENS & COMPANY, INC.
345 Park Avenue
New York, New York 10022
212-935-8764

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CARL D. LIGGIO, being duly sworn, deposes and states that he is associated with White & Case, that he has read the foregoing answers to interrogatories contained on pages 6 and 37 hereof which are subject to a protective order of this court and which interrogatories were propounded by defendants on the counterclaim, and that they are true to the best of his present knowledge and belief.

Carl D. Liggio

Sworn to before me this
6th day of April, 1971.

MARGARET M. BRANAGAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-[illegible]
Qualified in Queens County
Cert. filed in New York County
Term expires March 30, 1972

Notary Public

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JACK P. SCHWEBEL, being duly sworn, deposes and says that he is President of defendant Clark-Schwebel Fiber Glass Corporation, that he has read the foregoing answers to interrogatories (except for the material on pages 6 and 37 which is subject to a protective order), propounded by defendants on the counterclaim, and that they are true to the best of his present knowledge and belief.

Jack P. Schwebel

Sworn to before me this
6th day of April, 1971.

MARGARET M. BRANAGAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-[illegible]
Qualified in Queens County
Cert. filed in New York County
Term expires March 30, 1972

SIR:

PLEASE TAKE NOTICE that a.....

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which the within is a true copy, has been made herein and was duly entered and filed in the office of the Clerk of the

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on the.....day of.....

19.....

WHITE & CASE

Attorneys for.....

14 Wall Street,
Borough of Manhattan,
New York City.

To.....

Attorney for.....

INDEX NO. 66 Civ. 4230

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, et al.,
Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.,
Defendants,

-and-

VERNES GRAFSTROM
Defendant on the Counterclaim.

COPY

ANSWERS TO INTERROGATORIES SET IV

WHITE & CASE

ATTORNEYS FOR Defendants.

14 Wall Street
Borough of Manhattan
New York City
RECTOR 2-1040

TO

ATTORNEY FOR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants,

-and-

VERNES F. GRAFSTROM,

Defendant on the Counterclaim.

ANSWER TO INTERROGATORIES

66 CIV. 4230
C.I. No. 158(2)

Defendants Clark-Schwebel Fiber Glass Corporation, Burlington Industries, Inc. and J. P. Stevens & Company, Inc. hereby answer plaintiffs' interrogatories (Set III) as follows:

ANSWERS TO INTERROGATORIES 1, 2 and 3

Defendants have retained Harold Friedman of Joseph S. Herbert & Company, 9744 Wilshire Boulevard, Beverly Hills, California 90212 as an expert. Mr. Friedman will testify that the financial statements of Textura and Fenestra were not prepared in conformity with generally accepted accounting principles, and did not present fairly the financial condition of Textura or Fenestra, or the results of the operations of Textura and Fenestra for the periods reported. He will testify further that these statements were false and misleading in material respects and materially distorted the true financial condition of Textura and Fenestra by, among other things, materially overstating earnings and assets and net worth, such as by recording a $77,000 profit during 1956 when there was in fact a loss of $30,000. He will also testify that the books and records of Textura and Fenestra were maintained in such

a manner as to give a false and misleading picture of the financial condition of the Company.

Many of the facts upon which Mr. Friedman testify will be established during the testimony of other witnesses including the plaintiffs themselves. Mr. Friedman will establish, among other things, that: (1) the books and records of Textura were improperly maintained; (2) inventory records were insufficient; (3) Textura failed to make adjustments to the reported inventories; (4) increases in inventory for fabrication and installation were unusually high and were not supported by any work papers; (5) inventory records for fabric were missing and incomplete; (6) expenses were not recorded on the books in the month in which incurred, nor accrued for financial statement purposes. As of June 30, 1966 at the very minimum the following expenses which had been incurred were not recorded on the books of Textura and/or Fenestra:

i) Purchased	- Fabric	$18,237.64
	- Fabrication	332.00
	- Installation	1,631.88
	- Freight In	313.25
ii) Sales Expenses	- Promotion	88.87
	- Travel	165.22
	- Telephone	100.90
	- Auto	25.04
	- Commission	922.79
iii) General and Administrative	- Utilities	85.90
	- Professional Services	650.00
	Total	$22,553.49

(7) Prepaid advertising of $21,512.73 had been capitalized on the books in 1965. This represented the balance of the cost of the "Yellott Book" in excess of reimbursement. In

1966, additional reimbursement of $6,550.00 was received. The remaining balance of $14,962.73, as Mr. Zimmerman (plaintiff's accountant) testified, should have been amortized within twelve months, of which $7,481.36 would be applicable to just six months of 1966 thus overstating income by that amount. Additional costs in 1966 of $3,420.06 should have been written off as incurred. Advertising expenses were understated by $10,901.42 for the six months ended June 30, 1966.

(8) Sales were consistently recorded in a month prior to completion and delivery of the merchandise sold. As of June 30, 1966, there was recorded on the books, sales totaling $99,356.04, which were completed and delivered subsequent to June 30, 1966. Included therein was an invoice for $68,825.00 for Santa Monica Shores dated July 7, 1966. The contract was dated July 6, 1966, and fabrication for the first building was completed floor by floor between August 17, 1966 and September 30, 1966; thus revenues and income were fraudulently overstated. The entire Santa Monica Shores Apartment was not completed until 1967.

(9) Goodwill in the amount of $58,602.03 and the Mo-Vac Distributorship in the amount of $200,000 should have been completely written off in an earlier period; or at the very minimum, these amounts should have been amortized during 1964, 1965 and 1966. Had proper accounting treatment been accorded these items, the balance sheets would have had to have been revised and the losses sustained by Textura would have been considerably greater than the amounts indicated elsewhere in this interrogatory answer.

(10) In addition, Messrs. Powrie and Johnstone had owed Textura $19,828.70 since at least 1964. These items were improperly carried on the books of Textura as current

accounts receivable. They were finally written off in toto as commission payments as of August, 1966, sometime in October or November, 1966. These should be allocated back and charged against income in the first six months of 1966 thus reducing income by at least $14,871.53.

In effect, all these and other adjustments to the financial statement which were required by proper accounting procedure to accurately reflect the true position of the Company, result in Textura having a net deficit as of June 30, 1966 of $47,000 rather than retained earnings of $60,000 shown on the balance sheets distributed by Powrie. (The write-offs of Mo-Vac and goodwill would serve to increase losses even more.) These adjustments also show that instead of having a $77,000 profit for the period as shown on the statements prepared by plaintiffs, Textura had a loss of $29,868 - a $100,000 difference in the financial position of Textura as represented by Powrie. These adjustments also show that the financial statements of Textura and Fenestra were, throughout the relevant period of time prior to 1966, materially false and misleading and materially distorted the true financial condition of Textura and Fenestra.

Finally Mr. Friedman will testify that throughout this period of time the books and records of Textura were kept in such a manner that it was impossible for the financial statements prepared and distributed by Powrie to

have been an accurate reflection of the true state of the financial position of Textura.

Dated: New York, New York
June 13, 1972

WHITE & CASE
Attorneys for Defendant
Clark-Schwebel Fiber Glass
Corporation
14 Wall Street
New York, New York 10005

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BERGSON, BORKLAND, MARGOLIS
& ADLER
Attorneys for Defendant
Burlington Industries, Inc.
21 DuPont Circle, N.W.
Washington, D.C.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS MCGANNEY, being duly sworn, states:

(1) I am associated with White & Case, attorneys for defendant Clark-Schwebel Fiber Glass Corporation, herein.

(2) I have read the foregoing answer to interrogatories and the answer is, to the best of my present knowledge and information and belief, true and accurate.

Thomas McGanney

Sworn to before me
this 13th day of June, 1972

Notary Public

ROBERT A. PERKINS
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-8327500 - Queens County
Certificate filed in New York County
Commission Expires March 30, 1974

INDEX NO. 66 civ. 4230

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. and MALCOLM G. POWRIE,
Plaintiffs,
-against-
CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.,
Defendants.
-and-
VERNES F. GRAFSTROM,
Defendant on the Counter-claim

COPY

ANSWER TO INTERROGATORIES

WHITE & CASE

ATTORNEYS FOR Def't.Clark-Schwebel

14 Wall Street
Borough of Manhattan
New York City
RECTOR 2-1040

TO.....

ATTORNEY FOR.....

172

SIR:

PLEASE TAKE NOTICE that a.....

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of which the within is a true copy, has been made herein and was duly entered and filed in the office of the Clerk of the

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on the.....day of.....

19.....

WHITE & CASE

Attorneys for.....

14 Wall Street,
Borough of Manhattan,
New York City.

To.....

Attorney for.....

Trial Markings (Copy of Pre-Trial Order as amended to May 1972 JPS + PI)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA LTD. IN BANKRUPTCY PROCEEDINGS FENESTRA FABRICS, INC. and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants,

-and-

VERNES GRAFSTROM,

Defendant on the Counterclaim.

PLAINTIFFS' PROPOSED PRE-TRIAL ORDER

66 CIV. 4230

On October 31, 1972, the attorneys for the parties to this action appeared before the Court at a pre-trial conference pursuant to local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken.

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in Paragraph 9 of this pre-trial order.

2. The parties agreed that the trial of this action shall be based upon the pleadings as amended, and no issues raised by the pleadings are abandoned.

3. (a) The parties stipulated that the following facts are not in dispute, in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

1. Defendants are found or transact business in the Southern District of New York and each was at relevant times engaged in the business of weaving and selling fiber glass fabrics for industrial and decorative applications;

2. Plaintiff CARLYLE MICHELMAN was duly appointed Trustee of plaintiff TEXTURA, in or about April 1967, in bankruptcy proceedings in the United States District Court for the Central District of California;

3. TEXTURA purchased decorative fiber glass fabrics from each defendant;

4. GLASS FABRICS, INC. ("GLASS FABRICS") was formed in April, 1954;

5. TEXTURA LTD. ("TEXTURA") was formed in March, 1962 and, on or about December 28, 1964, acquired all the assets of GLASS FABRICS;

6. FENESTRA FABRICS, INC. ("FENESTRA") was formed on January 4, 1960 as a wholly owned subsidiary of GLASS FABRICS;

7. When the assets of GLASS FABRICS were acquired by TEXTURA, on or about December 28, 1964, FENESTRA was also transferred to and continued as a wholly owned subsidiary of TEXTURA until sometime after August 1, 1966;

8. Sometime after August 1, 1966 the stock of FENESTRA was sold to POWRIE and defendant on the counterclaim VERNES F. GRAFSTROM ("GRAFSTROM") for a stated consideration of $500.00;

9. POWRIE was at all relevant times the President, principal stockholder and a director of TEXTURA;

10. POWRIE was at all relevant times the President and a director of FENESTRA;

11. GRAFSTROM was at all relevant times after December 28, 1964 a director of TEXTURA and FENESTRA;

12. Neither FENESTRA nor POWRIE purchased fiber glass fabrics for their own accounts from any of the defendants;

13. Neither FENESTRA nor POWRIE sought extension of credit for their own accounts from any of the defendants;

14. IRENE SHARP was at all relevant times the bookkeeper for TEXTURA and FENESTRA;

15. JOHN I. YELLOTT of YELLOTT SOLAR ENERGY LABORATORY performed services for TEXTURA in connection with the testing of fiber glass fabrics for heat-shade coefficient factors;

16. Some of TEXTURA's customers, including some decorators, did not have any interest in fabric heat-shade coefficient factors;

17. Many of the purchases by TEXTURA and GLASS FABRICS from defendants were of greige goods;

18. TEXTURA had customers to whom it sold exclusively on a cash basis;

19. Sometime in 1966 Menardi put TEXTURA on a cash basis;

20. On or about August 10, 1966 TEXTURA was notified by its factor, L. F. DOMMERICH & COMPANY ("DOMMERICH") that its account was cancelled, effective October 10, 1966;

21. On or about December 13, 1966 TEXTURA made an assignment for the benefit of creditors, and thereafter ceased business operations;

22. On or about March, 1967, TEXTURA was adjudicated bankrupt;

23. In 1965 POWRIE executed a personal guarantee in favor of BURLINGTON for that year;

24. POWRIE did not execute any personal guarantees in favor of any of the defendants in 1966;

25. Since in or about 1962 POWRIE had, as a matter of practice, given personal guarantees to DOMMERICH as a condition of DOMMERICH's doing business with TEXTURA;

26. TEXTURA was formed to engage initially in the purchase and sale of Rovana-Verel (synthetic petroleum based) fabrics;

27. FENESTRA was formed to bid directly on large fiber glass fabric jobs, purchasing its materials and services from GLASS FABRICS and subsequently from TEXTURA;

28. Greige goods were generally sent by defendants to MENARDI & COMPANY to be finished; finished goods were generally sent by defendants directly to TEXTURA.

(b) It is the plaintiffs' contention that:

1. Defendants are three of the principal manufacturers of fiber glass fabrics which they weave and sell for industrial and decorative applications. Prior to the acts of defendants alleged in the Amended Complaint, plaintiffs were in the business of converting and finishing such products and in their fabrication and sale for use as draperies and for sun control in residential, office and other buildings, for hospital cubicle curtains, fire retardation, oil well coverings and other applications, both industrial and decorative. Virtually all plaintiffs' requirements of such products, from 1954 through 1966, were purchased from these defendants. Plaintiff TEXTURA LTD. ("TEXTURA") and its predecessor in interest GLASS FABRICS, INC., were engaged in sales to jobbers, interior decorators and the retail trade. TEXTURA's affiliate, plaintiff FENESTRA FABRICS, INC. ("FENESTRA") dealt directly with building owners, contractors and architects, contracting with them for fabrication and installation in larger buildings and projects. Plaintiff MALCOLM G. POWRIE ("POWRIE") was the President and majority stockholder of both TEXTURA and FENESTRA.

Plaintiffs contend that, since at least 1956, the exact date being unknown to them, the defendants have been engaged in an unlawful and continuing combination and conspiracy

in unreasonable restraint of interstate trade and commerce in fiber glass fabrics, in violation of Sections 1 and 2 of the Sherman Act.

This conspiracy has consisted of continuing agreements, understandings and concerted actions by and between the defendants to restrain, suppress, avoid and eliminate competition in the manufacture, distribution and sale of ~~[illegible]~~ fiber glass fabrics by ~~excluding new entrants into the industry, establishing anti-competitive methods of distribution, allocating products and customers*~~ and by fixing, stabilizing and maintaining prices and terms and conditions of sale, including the extension and restriction of credit, shipments and deliveries, product quality and the treatment and adjustment of quality claims. Plaintiffs allege further that, in pursuance of their conspiracy, defendants took various concerted actions and discriminated against

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~~*The allegations that the defendants have restrained trade "by excluding new entrants into the industry, establishing anti-competitive methods of distribution, allocating products and customers" do~~ not appear specifically in the Amended Complaint. It is the plaintiffs' contention that they are entitled to include these allegations in the pre-trial order and to offer proof of these allegations at trial because these three methods of restraining trade are part and parcel of the "continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in fiber glass" "decorative" [Paragraph 18] and "industrial" [Paragraph 35] "fabrics in violation of Section 1 of the Sherman Act" alleged in the Amended Complaint. Plaintiffs contend that a complaint charging generally a "combination and conspiracy in unreasonable restraint of trade" need not set forth every specific method by which trade was unreasonably restrained.

plaintiffs, resulting in the destruction of plaintiffs' business through the bankruptcy of TEXTURA and the elimination of plaintiffs from the industry. The named co-conspirators, and the following co-conspirators among others:

OWENS-CORNING FIBERGLAS CORPORATION
SHERWOOD GUMBINER
PAUL ERSKINE
JAMES KAHN
PETER DUFF
JOHN HANKIN
WILLIAM C. O'CONNOR
CHARLES M. TRAVIS
LUDLOW P. VOLLERS
JOHN WILSON,

plaintiffs assert, participated in various aspects of the conspiracy and its schemes and sub-plots. These unlawful agreements and actions were effectuated by various meetings and communications among the defendants and co-conspirators, in New York City and elsewhere.

With respect to the destruction of plaintiffs' business, they contend that, commencing in or about October 1964, in furtherance of the aforementioned conspiracy, defendant CLARK-SCHWEBEL FIBER GLASS CORPORATION ("CLARK-SCHWEBEL") attempted to discourage plaintiffs from submitting and pursuing legitimate claims which they had with respect to the inferior quality of the fiber glass fabric products purchased from CLARK-SCHWEBEL. In or

about March 1966 and thereafter, CLARK-SCHWEBEL also refused to extend any credit to TEXTURA. In connection with the disputes which thereafter arose between plaintiffs and defendant CLARK-SCHWEBEL, the remaining defendants and some or all of the co-conspirators agreed to assist CLARK-SCHWEBEL and to intimidate and coerce plaintiffs into submission. It is plaintiffs' contention that in addition to and in connection therewith the defendants and co-conspirators conspired to destroy plaintiffs' business so that they would no longer be a competitive factor and could be replaced by an enterprise more amenable to defendants' practices in the conduct of their business.

As indicated above, defendant CLARK-SCHWEBEL arbitrarily rejected all of plaintiff's claims of inferior quality, and by such action, by refusal to extend credit and by continued delivery to plaintiffs of inferior quality products it thus discriminated against plaintiffs and in favor of competing customers of said defendant. As a result of defendant CLARK-SCHWEBEL's arbitrary and unjustified behavior described above, TEXTURA accumulated losses in the approximate sum of $30,000.00 which it was eventually compelled to take as a credit against invoices payable to CLARK-SCHWEBEL. Thereupon CLARK-SCHWEBEL instituted an arbitration proceeding against TEXTURA in a grossly inflated amount

in an attempt to intimidate TEXTURA. Simultaneously, defendants BURLINGTON INDUSTRIES, INC. ("BURLINGTON") and J. P. STEVENS COMPANY, INC. ("STEVENS"), pursuant to said conspiracy, threatened to restrict TEXTURA's credit unless TEXTURA settled the dispute with CLARK-SCHWEBEL, upon terms obviously favorable to CLARK-SCHWEBEL, and further they began demanding personal guarantees from plaintiff POWRIE, as did CLARK-SCHWEBEL. In continuing furtherance of said conspiracy defendants either refused or drastically restricted plaintiffs' credit. Defendant BURLINGTON halted deliveries to plaintiffs of important fiber glass fabric products under contracts already in progress. The quality of such fabrics as were delivered by defendants to plaintiffs deteriorated markedly.

At this point plaintiffs had no alternative but to settle their dispute with CLARK-SCHWEBEL upon extremely unfavorable terms, which eventually they could not meet. Defendants nevertheless continued their conspiratorial behavior towards TEXTURA by refusing or limiting credit, by delivering poor quality fabric and refusing to deliver quantities of plaintiffs' most important fabric lines, thus exhausting plaintiffs' capital. Moreover, at this time, as well as in the past, TEXTURA's factoring arrangements had been handled by L. F. DOMMERICH & CO., INC. ("DOMMERICH"). Induced by defendants and their conduct, DOMMERICH

on or about August 10, 1966, cancelled its contract with TEXTURA, leaving TEXTURA in a precariously dangerous financial condition, from which it could not and did not recover.

Plaintiffs further contend that plaintiffs FENESTRA and POWRIE were within the target area of defendants' conduct inasmuch as their acts were also directed specifically at them.

Defendants through their concerted activity and conspiracy have, in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, eliminated competition and jointly and individually discriminated against plaintiffs in favor of other customers. These acts have furthermore constituted attempts to monopolize and monopolization of a part of the trade and commerce in fiber glass fabric products, in violation of Section 2 of the Sherman Act, and unlawful discrimination, in violation of Sections 2(a) and (e) of the Clayton Act as amended by the Robinson-Patman Act. As a further result of defendants' unlawful activities, prices of fiber glass fabrics have been artifically raised or stabilized and competition has been restrained, suppressed and eliminated.

Plaintiffs take the position of denying all the material allegations of the counterclaims. Furthermore they specifically deny that any false or fraudulent representations or acts were made or engaged in by plaintiffs or defendant-by-counter-

claim VERNES F. GRAFSTROM ("GRAFSTROM"). Plaintiffs contend that the Court lacks jurisdiction of the person of GRAFSTROM. Plaintiffs argue further that they should have had opportunity to be heard on the question of bringing in an additional party and asserting counterclaims, in light of the extremely late stage in the proceedings in which they occurred. Plaintiffs also contend that the counterclaims fail to state a cause of action and that the Court lacks jurisdiction of the subject matter thereof.

Finally, it is plaintiffs' position that the allegations of the counterclaims are not directed to the issues raised by the Complaint, as amended, and, in the absence of a timely jury demand, pursuant to Rule 38(b) of Federal Rules of Civil Procedure, the issues raised by the counterclaims and replies must be tried by the Court without a jury. Plaintiffs further object to defendants' contentions, in their pre-trial memorandum, concerning plaintiffs' alleged lack of standing to sue, since these were not raised as defenses in their pleadings as required by Rules 8 and 9 of the Federal Rules of Civil Procedure.

[illegible]. As a direct and proximate result of the aforesaid unlawful acts and conduct of the defendants, the plaintiffs have been injured in their business and property, and have suffered

great monetary damage through increased expenses, loss of sales and profits, good will and actual and potential customers. The entire business of TEXTURA and FENESTRA has been effectively destroyed and TEXTURA has involuntarily been put into bankruptcy. Plaintiff POWRIE has been injured individually in his business and property and has suffered and is continuing to suffer great monetary damage through loss of salary and other benefits, loss of his property used as security for loans, personal payment of plaintiffs' obligations and damage to his credit and business reputation.

Plaintiffs accordingly claim treble damages pursuant to Section 4 of the Clayton Act, as follows:

a. $8,025,000.00 for the damages suffered by TEXTURA;

b. $1,500,000.00 for the damages suffered by FENESTRA; and

c. $1,785,000.00 for the damages suffered by POWRIE;

together with related injunctive relief, costs and attorneys' fees.

(C) IT IS THE DEFENDANTS' CONTENTIONS THAT:

ANSWER TO AMENDED COMPLAINT

Each defendant denies all the material allegations of the Amended Complaint.

Each defendant also alleges that plaintiffs' claims are barred by the statute of limitations and laches.

Each defendant contends that the Complaint fails to set forth a claim on which relief can be granted.

STANDING OF PLAINTIFFS

Defendants contend that plaintiffs' POWRIE and FENESTRA lack standing to sue for the antitrust violations alleged in the Complaint.

ROBINSON-PATMAN CLAIMS

Each defendant contends that the purported Robinson-Patman claims are invalid because: (a) none of the defendants sold TEXTURA goods of like grade and quality as it sold to TEXTURA's alleged competitors; (b) the seven alleged competitors were not in fact competitors of TEXTURA; and (c) differing terms of credit, to the extent there were any, were based on valid business judgment.

A. Terms of Credit

Each of the defendants contends that the terms of

credit extended to TEXTURA were at least as favorable as those extended to any of its alleged competitors. (In addition, CLARK-SCHWEBEL claims that the only sale it made to an alleged competitor of TEXTURA occurred prior to the date of the supposed discriminatory practices alleged in the Complaint).

In addition, each of the defendants contends that TEXTURA obtained terms of credit that were, in fact, substantially more favorable than those accorded to its alleged competitors by virtue of TEXTURA's unilateral practice of paying its bills late.

B. Adjustments on Merchantability

CLARK-SCHWEBEL contends that it made only one sale to an alleged competitor of TEXTURA during the period covered in the Complaint and that no adjustment was given to this alleged competitor. CLARK-SCHWEBEL also contends that to the extent that TEXTURA's request for adjustments on its quality claims were substantiated properly, they were granted. However, TEXTURA's requests were, on almost all occasions, not properly substantiated. Among other reasons, the goods sold to it were finished by a third party, making it virtually impossible to tell how the alleged defects in the fabrics arose.

There is no claim that BURLINGTON or STEVENS discriminated with respect to claims for adjustments on allegedly defective goods, nor rejected any claims for adjustment, nor failed

to give fair adjustments.

C. The Merchantability of Fabrics Sold

Each defendant contends that the merchantability of fabrics it sold to TEXTURA was the same as that of the goods it sold to TEXTURA's alleged competitors.

CLAIM OF CONSPIRACY TO RESTRICT PLAINTIFFS' CREDIT

Each defendant contends that its decision concerning the extent of credit it would allow to TEXTURA (and the nature and terms of such credit, including requests for personal guarantees) was independently arrived at and was based on an independent evaluation of TEXTURA's credit standing and ability to pay its bills -- as well as its repeated failure to pay its bills on time.

Prior to TEXTURA's assignment for the benefit of creditors, STEVENS never refused to sell or deliver goods to TEXTURA or to extend credit to it. TEXTURA admits that it was never put on a cash basis by STEVENS.

BURLINGTON extended credit to TEXTURA throughout 1966. All modifications of terms and conditions of credit after August 1966 were the result of TEXTURA's request therefor.

Prior to TEXTURA's assignment for the benefit of creditors, BURLINGTON never refused to make deliveries to TEXTURA.

Prior to March 1966, CLARK-SCHWEBEL limited TEXTURA's credit because, among other things, of substantial and long-overdue unpaid accounts. Thereafter, CLARK-SCHWEBEL put TEXTURA on a cash basis because (a) TEXTURA improperly took a $30,000 credit, and then (b) defaulted twice on its agreement to pay $92,000 on unpaid bills. Nonetheless, in October, 1966, CLARK-SCHWEBEL extended TEXTURA credit on open terms.

None of the defendants took any steps to persuade L. F. DOMMERICH & CO. ("DOMMERICH"), TEXTURA's factor, to terminate its factoring agreement with TEXTURA. Each of the defendants contends that, as DOMMERICH's president testified, DOMMERICH's decision to terminate its factoring relationship with TEXTURA was based on the following factors: TEXTURA's failure to meet every financial projection given to DOMMERICH; TEXTURA's factoring of non-existent accounts receivable; and the advice by TEXTURA's accountant that he had refused to issue TEXTURA's June, 1966 financial statement because it contained "phony accounts receivable".

None of the defendants prevented or sought to prevent a new factor from entering into a factoring arrangement with TEXTURA after the termination of TEXTURA's factoring agreement with DOMMERICH. As shown in, among other places, the testimony of

DOMMERICH's present and past employees, including its President, defendants contend that DOMMERICH took no steps to prevent another factor from entering into a factoring agreement with TEXTURA.

PRICE FIXING CLAIM

Each of the defendants contends that plaintiff's claim of price fixing on industrial fiberglass is irrelevant since none of the defendants sold industrial fiberglass to TEXTURA except for a de minimis sale by BURLINGTON (in the amount of $2,621.10) which was a close-out sale*. The claim is also unsupported.

With respect to decorative fiberglass fabrics, none of the defendants has issued any price lists. Instead, the price of each decorative fiberglass fabric was negotiated separately with each customer by each defendant. (Each decorative fiberglass fabric is individually woven and styled to suit the customer specifications). Consequently, there has been no identity in price between the various decorative fiber glass fabrics sold by the defendants.

The distinction between decorative and industrial fiberglass fabrics, as those terms are used in the industry, is one of long standing. They are for the most part woven out of different kinds of yarns and, in all cases, the yarns used in decorative fabrics are processed and finished differently from those to be

*Glass Fabrics also purchased $6,239.29 of industrial fiberglass from Burlington.

used in industrial fabrics. In addition, industrial fiberglass is usually woven to standard specifications such as those issued by the United States Government. Industrial fiberglass is used, for example, in aircraft nose cones, fishing rods, circuit panels, boats, insulators and the like. On the other hand, decorative fiberglass fabrics - those purchased by plaintiff - are designed with aesthetic considerations in mind, are individually styled and woven to the specifications of a particular customer and are used primarily for draperies. The dissimilarity caused by specialized weaving and design in decorative fabrics means different labor costs and expenses.

The allegations which plaintiffs assert in support of their claims that defendants violated the Robinson-Patman Act and Section 1 of the Sherman Act are also asserted in support of their claim that defendants violated Section 2 of the Sherman Act. Defendants contend, as discussed above, that these allegations are without substance and merit. In addition, there was no intent on the part of any defendant to acquire monopoly control of any relevant market. Moreover, no defendant attempted to possess or actually possessed monopoly power in any relevant market. Both industrial and decorative fiberglass fabrics make up only a relatively small portion of the relevant markets in which they compete. Decorative fiberglass fabrics -- which are used primarily for draperies in homes and commercial institutions -- compete with other types of window coverings, such as venetian blinds, and with draperies made out of other fabrics, such as cloth or different types of synthetics. Industrial fiberglass competes

with many other products: with wood in boat building, with nylon in tires, and with other types of insulators in housing.

DEFENDANTS' COUNTERCLAIMS

Each defendant claims that the plaintiffs and VERNES F. GRAFSTROM ("GRAFSTROM"), defendant on the counterclaim, conspired together and with others to induce credit, and cash and advertising rebates from the defendants by fraud. Defendants claim that the books of TEXTURA were deliberately maintained in such a way as to misstate intentionally the profitability and financial status of TEXTURA. Thus, income not yet earned for jobs not yet started was included in revenue. Expenses were improperly capitalized and inconsistent income periods were used -- which improperly inflated income. Defendants contend that plaintiffs and GRAFSTROM, together with others, intentionally prepared or caused the preparation of false financial statements which were deliberately used to induce credit and advertising rebates from the defendants and others.

Defendants also contend that POWRIE and GRAFSTROM orally and intentionally misrepresented TEXTURA's solvency, financial profitability, and future propects to defendants for the purpose of inducing credit.

Defendants also contend that POWRIE and GRAFSTROM conspired -- by deliberate misappropriation of corporate assets to their personal use -- to prevent TEXTURA's creditors from being paid. For example, POWRIE caused TEXTURA to cancel his debt to it, without consideration; caused TEXTURA to pay him an overly generous salary in view of its financial circumstances; caused TEXTURA to transfer real estate to himself for less than its fair market value; caused TEXTURA to pay his personal expenses in excess of $10,000; and caused TEXTURA to sell himself and GRAFSTROM all the stock in FENESTRA for an amount substantially below its fair market value. Furthermore, POWRIE and GRAFSTRIM deliberately concealed from defendants their improper misappropriation of TEXTURA's assets for their personal use.

At all relevant times POWRIE and GRAFSTROM acted individually and on behalf of and as agents for TEXTURA and FENESTRA.

Defendants contend that TEXTURA's insolvency was caused by the aforesaid personal diversion of TEXTURA's corporate assets and by mismanagement of TEXTURA's operations.

The facts of the counterclaims are also asserted as affirmative defenses to the Amended Complaint.

DAMAGES

A. Plaintiffs' Claimed Damages.

Defendants will show at trial that plaintiffs have

suffered no damage.

TEXTURA's damages purportedly arise from its being driven out of business and from its loss of profits. In point of fact, however, TEXTURA never made money and was a loss operation. As is more fully set out and will be shown in defendants' counterclaim, the financial statements of TEXTURA were falsified so as to create the illusion of a profit when, in fact, there was none. Thus, instead of showing a profit of $70,000 for the six months ended June 30, 1966, TEXTURA, in fact, had a loss of $30,000; instead of having a substantial net worth, it was almost bankrupt. The poor financial condition and bankruptcy were not caused by any act of defendants, but resulted from other factors, including POWRIE's use of corporate assets for personal benefit.

Aside from not having standing to sue, FENESTRA did not and could not suffer any loss. As plaintiffs themselves admitted, FENESTRA had no independent economic existence. All of its sales and expenses were washed directly into the books of TEXTURA. Any profit FENESTRA made or loss it incurred was, therefore, transferred to TEXTURA and would be shown on TEXTURA's financial statements.

Aside from not having standing to sue, POWRIE has suffered no damage. By this action he seeks to recover moneys which he has already recovered. For example, he seeks as damages moneys paid on guarantees executed on behalf of TEXTURA to L. F.

DOMMERICH & CO. Yet, he has already recovered that money by offsetting it against moneys owed him by TEXTURA. Thus, he can have no loss. He further claims loss of value of his stock. Yet, if TEXTURA has been damaged and is made whole, there is no loss in value to his stock; and if TEXTURA has not been damaged, then there has been no independent injury to the value of the stock for which he may recover. What POWRIE really seeks is double recovery. Plaintiffs' claims are unsubstantiated by fact.

B. Defendants' Damages.

Defendants seek substantial damages from plaintiffs and defendant-on-the-counterclaim, GRAFSTROM. They seek damages for those moneys which they have lost as a result of the intentional and fraudulent falsification of TEXTURA's financial statements for the purpose of inducing defendants to extend credit to TEXTURA which plaintiffs and GRAFSTROM knew could not be repaid. These damages total over $80,000. Moreover, as this was done with the full knowledge of the falsity of the financial statements and with the intention to induce credit which plaintiffs and GRAFSTROM knew they could not repay, defendants are entitled to punitive damages on their counterclaim. Defendants also seek reimbursement for lost profits and for reasonable costs and disbursements of these actions.

4. The parties have exchanged or identified substantially all of the documents expected to be offered in evidence at the trial. The parties reserve all objections to specific docu-

ments, but will stipulate to their authenticity, genuineness and admissability a reasonable time in advance of trial. Xerox copies of documents may be introduced in evidence in place of the originals as to all documents identified and described in the parties' stipulation pursuant to this paragraph, with the exception only as to those documents the parties specifically except from such clause by written notice, served no later than December 29, 1972. Prompt notice of additional documents expected to be offered in evidence shall be given by each party to the others, and to the Court.

5. The parties agree that the witnesses whom each party now intends to call are those listed in the memoranda heretofore filed pursuant to local Calendar Rule 13(b) III(h). Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial Judge. It shall set forth the reason why the witness was not theretofore identified. No witness whose identity has not yet been disclosed may be called at trial unless identified in a pre-trial memorandum.

6. The parties agreed to limit the number of expert witnesses as follows:

Of the expert witnesses named in plaintiffs' designation dated May 10, 1972, and defendants' interrogatory answers dated June 13, 1972,

a. Plaintiffs agree to name their expert witnesses by November 30, 1972 and to call no more than two expert witnesses on the issue of:

1. Damages;
2. Accounting;
3. Liability.

b. Defendants agree to call no more than two expert witnesses on the issue of:

1. Damages;
2. Accounting;
3. Liability.

Should any partyhereafter decide to call in additional expert witnesses, prompt notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the Deputy Clerk for Calendars, unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the

witness whose identity has not yet been disclosed may be called at trial unless identified in a pre-trial memorandum.

7. The following are all of the claims for damages or for other relief asserted by the plaintiff in this action, as of the date of this conference:

a. TEXTURA's damages (trebled) are at least $8,025,000.00;

b. FENESTRA's damages (trebled) are at least $1,500,000.00;

c. POWRIE's damages (trebled) are at least $1,785,000.00;

d. Reasonable attorneys' fees, interest, costs and disbursements for all plaintiffs;

e. An injunction prohibiting defendants from continuing their illegal acts.

A. The following are all of the claims for damages or other relief asserted by defendants' counterclaims, as of the date of this conference:

1. J. P. STEVENS' damages are $517,156.60 plus undetermined lost profits and costs and disbursements;

2. BURLINGTON's damages are $516,156.60 plus

undetermined lost profits and costs and disbursements;

3. CLARK-SCHWEBEL's damages are $557,132.53 plus undetermined lost profits and costs and disbursements.

8. The parties also agreed on the following matters:

(a) Plaintiffs at this time expect to require approximately five or six trial weeks; defendants at this time expect to require approximately one trial week.

9. The issues to be tried are formulated by the Court (with the consent and agreement of the parties) as follows:

1. Whether as alleged in the Amended Complaint defendants conspired to and did restrain, suppress, avoid or eliminate competition in the sale of fiber glass fabrics;

2. Whether as alleged in the Amended Complaint defendants attempted to monopolize or did monopolize trade and commerce in fiber glass fabrics;

3. Whether defendants or any of them discriminated against TEXTURA in connection with the sale of fiber glass fabrics to TEXTURA;

4. Whether each plaintiff sustained the damages stated in the pre-trial order, if any;

5. Whether the plaintiffs' claims are barred by the Statute of Limitations or laches;

6. Whether plaintiffs fail to state a claim upon which relief can be granted;

7. Whether TEXTURA is entitled to assert against any defendant any claims that GLASS FABRICS may have had against it;

8. The period of time and the products involved in the said conspiracy, attempt to monopolize and monopolization;

9. Whether the said conspiracy was fraudulently concealed by defendants from plaintiffs and, if so, what is the earliest date at which plaintiffs could have uncovered the conspiracy by the exercise of due diligence;

10. Whether defendants are precluded from asserting the defense of lack of standing against plaintiffs POWRIE and FENESTRA by virtue of their failure to specifically assert lack of standing as contrasted with failure to state a claim as an affirmative defense in their answers and, if not, do POWRIE or FENESTRA lack standing to sue;

11. Do defendants' counterclaims state a cause of action;

12. Does jurisdiction over the person of GRAFSTROM exist in this Court;

13. Does jurisdiction over the subject matter of defendants' counterclaims exist in this Court;

14. Are defendants entitled to a trial by jury with respect to the issues raised by their counterclaim;

15. Whether plaintiffs and GRAFSTROM, or any of them, conspired to or did defraud the defendants into extending credit and/or rebates to TEXTURA;

16. Whether each defendant sustained the damages stated in the pre-trial order, if any; and

17. Whether defendants' are entitled to punitive damages.

Dated: New York, New York
1972

SO ORDERED:

_____
U.S.D.J.

CONSENTED TO:

WHITE & CASE

By_____
A MEMBER OF THE FIRM
ATTORNEYS FOR DEFENDANT CLARK-SCHWEBEL FIBER GLASS CORPORATION

PAUL WEISS RIFKIND WHARTON & GARRISON

By_____
A MEMBER OF THE FIRM
ATTORNEYS FOR DEFENDANT J. P. STEVENS & COMPANY, INC.

BERGSON BORKLAND MARGOLIS & ADLER

By /s/ D L H
A MEMBER OF THE FIRM
ATTORNEYS FOR DEFENDANT
BURLINGTON INDUSTRIES, INC.

Plaintiffs and GRAFSTROM consent to the form of this Order and to all parts of this Order except they do not consent to Magistrate Raby's deletions of certain contentions from plaintiffs' contentions set forth in Paragraph 3(b) of this Order. The deleted material, crossed out by red pencil lines, appears at page 7 of this Order.

REGAN GOLDFARB POWELL & QUINN

By
A MEMBER OF THE FIRM
ATTORNEYS FOR PLAINTIFFS AND GRAFSTROM

NOTICE OF ENTRY

e notice that the within is a *(certified)*

n the office of the clerk of the within
1 19

Yours, etc.,
GOLDFARB POWELL & QUINN

ice and Post Office Address
445 PARK AVENUE
MANHATTAN NEW YORK, N. Y. 10022

NOTICE OF SETTLEMENT

ke notice that an order

within is a true copy will be presented
to the Hon.

idges of the within named Court, at

day of ; 19
M.

Yours, etc.,
GOLDFARB POWELL & QUINN

lice and Post Office Address
445 PARK AVENUE
MANHATTAN NEW YORK, N. Y. 10022

Index No. 66 CIV. 4230 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, et al,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al,

Defendants,

-and-

VERNES GRAFSTROM,

Defendant on the Counterclaim

PLAINTIFFS' PROPOSED PRE-TRIAL ORDER

REGAN GOLDFARB POWELL & QUINN

Attorneys for Plaintiffs & Def. on the Counterclaim

Office and Post Office Address, Telephone

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YO[illegible] N. Y. 10022

(212) 421-8800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

203

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No. deponent served the within

upon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. and MALCOLM G. POWRIE,		
	Plaintiffs,	CIVIL ACTION NO. 66 Civ. 4230
-against-		Cal. No. 158(2)
CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,		DEFENDANTS' PROPOSED JURY INSTRUCTIONS
	Defendants,	
-and-		
VERNES F. GRAFSTROM,	Defendant on the counter-claim.	

Defendants, Clark-Schwebel Fiber Glass Corporation, Burlington Industries, Inc. and J. P. Stevens & Company, Inc. offer for consideration herewith a proposed set of jury instructions.

Respectfully submitted,

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Dated: New York, New York
October 8, 1974

DEFENDANTS' TENDERED INSTRUCTION NO. 1

Ladies and Gentlemen of the Jury --

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the evidence. You are to perform your duty as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Now that you have heard all of the evidence, heard all of the arguments of counsel, it becomes my duty to give you the instructions of the Court as to the law applicable to this case, and it is your duty as jurors to follow the law as I state it to you in these instructions and to apply the rules of law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law as stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

[A substantially similar charge was given in Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967); rev'd 416 F. 2d 71 (9th Cir.), cert. denied, 396 U.S. 1062 (1969; in N. W. Elec. Power Corp. v. Maloney Elec. Co., Civil No. (W.D. Mo. 1964); in Farmington Dowel Products Co. v. Forster Mfg. Co. 297 F. Supp. 924 (D. Me. 1969), modified 421 F. 2d 61 (1st Cir. 1970); in Sonken-Galamba Corp. v. Aluminum Co. of America, Civil No. 14,376 (W.D. Mo. 1966); and in Estate of LeBaron v. Rohm & Haas Co., 441 F. 2d 575 (9th Cir. 1971), and is reprinted in ABA Antitrust Civil Jury Instructions 132-33 (1972).]

DEFENDANTS' TENDERED INSTRUCTION NO. 2

This case should be considered and decided by you as an action between persons of equal standing in the community of equal worth, and holding the same or similar stations in life. The law does not distinguish persons on the basis of wealth; all persons stand equal before the law, and are to be dealt with as equals in a court of justice. When we speak of persons, for the purposes of this case corporations are to be considered in the same standing as persons.

Now, as I said, a corporation is entitled to the same fair trial at your hands as if it were a private person. All persons, including corporations, no matter what the total sales are or what the total income may be, whether it is in the hundreds of millions or in the zeros or whether it had losses - it doesn't make any difference - all of them must stand equal before the bar of justice and are to be dealt with as equals in this Court.

The plaintiff and the defendants in this case are corporations and they are entitled to the same fair and unprejudicial treatment that any individual would receive under like circumstances.

[A substantially similar charge was given in Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967, rev'd 416 F. 2d 71 (9th Cir.), cert. denied, 396 U.S. 1062 (1969), reprinted in ABA Antitrust Civil Jury Instructions 139-40 (1972).]

DEFENDANTS' TENDERED INSTRUCTION NO. 3

Now the action is brought by the plaintiffs and the burden is upon the plaintiffs to prove their case. If plaintiffs have not met their burden, then you must find for defendants. All the allegations necessary to enable the plaintiffs to recover must be proved by the plaintiffs by a preponderance of the evidence: What does "preponderance of the credible evidence" mean? It means the greater weigl of the evidence and the quality of the evidence, rather than quantity merely. It means that for plaintiffs to succeed the evidence to support their position must be more believable, more credible, than that urged in support of the defendants' position. The fact that the plaintiffs charge the defendants with antitrust violations does not place any burden upon the defendants to rebut that charge by the introduction of any proof, unless and until the plaintiffs shall have presented competent proof to support their charges made against defendants.

It is not enough for the plaintiffs to introduce evidence which leaves it a matter of speculation as to whether or not their case has been proved. Plaintiffs have to remove the case from the field of speculation and prove their case by the greater weight of the credible evidence. If they fail to do so, they are not entitled to recover. If plaintiffs' proof leaves you in a position where you cannot determine whether their allegations have been proved or not proved, then you must also find for the defendants.

The same is likewise true with regard to the counterclaim by the defendants. All the allegations of that

counterclaim necessary to enable the defendants to recover must be proved by the defendants by a preponderance of the evidence.

[Substantially similar charges were given in Kenmore-Louis Theatre Inc. v. Loew's Boston Theatres, Inc., Civil No. 59-184-J (D. Mass. 1963), reprinted in ABA Antitrust Civil Jury Instructions 118 (1972); in Siegfried v. Kansas City Star Co., 193 F. Supp. 427 (W.D. Mo. 1961), aff'd, 298 F. 2d 1 (8th Cir.) cert. denied, 369 U.S. 819 (1961), reprinted in ABA Antitrust Civil Jury Instructions 113 (1972); and in Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (E.D. Pa. 1960), aff'd, 297 F. 2d 199 (3rd Cir. 1961), cert. denied, 369 U.S. 839 (1962); Pacific Lanes, Inc. v. Washington State Bowling Proprietors Ass'n., Civil No. 5381 (W.D. Wash. 1965), and Park Neponset Corp. v. Smith, 258 F. 2d 452 (1st Cir. 1958), reprinted in ABA Antitrust Civil Jury Instructions 113-14 (1972).]

DEFENDANTS' TENDERED INSTRUCTION NO. 4

You are the sole judge of the credibility of the witnesses. This means that you must decide which witnesses you are going to believe and to what extent you are going to believe them. In determining how much weight you will give the testimony of each witness, you should consider the manner in which he testified, whether he impressed you as being truthful, whether he showed any bias or prejudice toward one side of the case of the other, whether he showed any bias or prejudice toward one side of the case or the other, whether he has any interest in the outcome of the case, and whether his testimony was reasonable in light of all the evidence in the case. It is only one, among a number of factors, which you may consider in determining what weight you will give to the testimony of each witness, you have the right to draw upon your own experience and common sense and upon all the factors that you think are important, in determining whether a person is telling the truth. If you believe any witness has testified falsely, then you may disregard all or any part of his testimony.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause you to discredit or disbelieve such testimony. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

The credibility of a witness may be attacked by

introducing evidence that on some former occasion, such as his deposition before trial, he made a statement or acted in a manner inconsistent with his testimony in this case on a matter material to or related to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

[A substantially similar charge was given in Adams Dairy Co. v. St. Louis Dairy Co., 260 F. 2d 46 (8th Cir. 1958), reprinted in ABA Antitrust Civil Jury Instructions 120 (1972); a similar charge in part was given in Clements v. McGraw-Hill Publishing Co., Civil No. 143-51 (S.D.N.Y. 1964), reprinted in ABA Antitrust Civil Jury Instructions 119 (1972).]

DEFENDANTS' TENDERED INSTRUCTION NO. 5

CONSPIRACY

Plaintiff, Textura, claims that many of the actions of which it complains in this case were the result of a conspiracy among the defendants. Plaintiff claims that there was a conspiracy among the defendants to drive Textura out of business by restricting its credit. Before turning to this specific charge, you should first consider more generally what a conspiracy is and how its existence must be proved.

A conspiracy is a combination of two or more persons to accomplish some unlawful purpose by concerted action or to accomplish some lawful purpose by unlawful means. The essence of a conspiracy within the meaning of the Sherman Act is a combination or agreement to act together for the purpose and with the effect of imposing an unreasonable restraint on trade or commerce.

If plaintiff has produced no direct evidence of agreement, it may attempt to prove a conspiracy by asking you to draw inferences from defendants' conduct. However, I instruct you that similarity of conduct among various persons does not establish proof of the existence of a conspiracy. Parties may act similarly and yet their actions may not be necessarily directed or controlled by any agreement or understanding between them. It may be in a given case that a defendant and one or more of the other defendants or alleged co-conspirators arrived at the same conclusion entirely

independently; it is possible that ordinary business judgment dictates a certain course of conduct, for instance, where a customer is habitually late paying accounts or refusing to give a personal guarantee as security for credit the customer is seeking. It may be such an obvious thing that everybody in that same business feels that it is the only correct action to take to protect themselves individually. In this case, if you find that is the fact, it would not support the finding of an illegal conspiracy.

As I stated, similarity of conduct does not establish the existence of a conspiracy. Moreover, no inference of an agreement, combination, concerted action, or common design among defendants and other alleged conspirators may be made from similar or identical action on the part of two or more of them if such similar or identical action is consistent with each having acted independently. For example, if you find that defendants' request for Mr. Powrie's personal guarantee is as consistent with each having acted independently and in their own self-interest as with such action having resulted from any agreement among them, you will not consider such requests for a personal guarantee as evidence of any such agreement upon the part of the defendants.

Plaintiff has the burden of proving by a preponderance of the evidence that defendants' actions were contrary to their own independent self-interest. If plaintiff does not sustain this burden, no conspiracy can be found by circumstantial evidence.

See American Tobacco Co. v. U.S., 328 U.S. 781 (1946) and Theatre Enterprises, Inc. v. Paramount Film Distributing

Corp. 346, U.S. 537 (1954); a substantially similar charge was given in Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 925 (D. Hawaii 1967), rev'd, 416 F. 2d 71 (9th Cir.), cert. denied, 396 U.S. 1062 (1969), reprinted in ABA Antitrust Civil Jury Instructions 1 (1972); a substantially similar charge was also given in Volasco Products Co. v. Lloyd A. Fry Roofing Co., 223 F. Supp. 712 (E.D. Tenn. 1963), aff'd, 346 F. 2d 661 (6th Cir.), cert. denied, 382 U.S. 904 (1965), reprinted in ABA Antitrust Civil Jury Instructions 16 (1972); and in City of Burlington v. Westinghouse Electric Corp., 246 F. Supp. 839 (D.D.C.), reversed, 351 F. 2d 762 (D.C. Cir. 1965), reprinted in ABA Antitrust Civil Jury Instructions 24 (1972).

DEFENDANTS' TENDERED INSTRUCTION NO. 7

CONSPIRACY

In connection with the question of burden of proof, and preponderance of the evidence, and with specific reference to the issue of conspiracy, you will be governed by the following rule: The existence of a conspiracy cannot be established as to one defendant by the acts or statements of another alleged co-conspirator, or co-defendant, unless the defendant's connection with the alleged conspiracy is established by independent proof received as to it, that is, by evidence received as to it of its own acts, its own statements, or its own conduct.

Unless a conspiracy has been proved to your satisfaction by independent evidence, no weight can be given hearsay statements as to the existence of a conspiracy. A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted. Such hearsay statements of an alleged conspirator can only be considered against another alleged conspirator if there actually was a conspiracy. Therefore, no reliance can be placed on such hearsay statements unless and until the conspiracy is directly proved by separate, non-hearsay testimony. Hearsay statements and evidence, because they cannot be tested by cross-examination, are entitled to less weight than direct evidence.

Similar charges were given in Utah Pie Co. v. Continental Baking Co., 349 F. 2d 122 (10th Cir. 1965), rev'd 386 U.S. 685 (1967), reprinted in ABA Antitrust Civil

Jury Instructions 29-30 (1972) and in Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., Civil No. 3067 (S.D. Ohio 1969), rev'd, 459 F. 2d 138 (6th Cir. 1972), reprinted in ABA Antitrust Civil Jury Instructions 23 (1972).

DEFENDANTS' TENDERED INSTRUCTIONS 8-12

Plaintiff Textura claims that defendants conspired to drive it out of business. Plaintiff further claims that this was done by, among other things, restricting Textura's credit beginning in March 1966. There has been testimony that defendants received complaints from Textura's competitors. However, the unrebutted evidence is that no defendant believed that Textura's method of selling in the direct contract market was wrong or improper. Moreover, at least one defendant, Clark-Schwebel gave Textura money and assisted it in receiving moneys from others for the Engineer's Guide, the purpose of which was to promote Textura's method of selling. Furthermore, there is no evidence in the record that there were any conversations between the defendants concerning Textura's method of distribution. Thus, no inference of a conspiracy to drive Textura out of business may be drawn merely because of these complaints.

As to an agreement between defendants to drive Textura out of business by restricting Textura's credit, if you find no direct evidence of such an agreement, plaintiffs may prove a conspiracy by circumstantial evidence. Plaintiffs would have you infer an agreement by the fact that defendants' credit persons had several conversations concerning plaintiff's credit standing and possible future action or outstanding matters, such as pending requests regarding Mr. Powrie's personal guaranty. However, I instruct you that as a matter of law, the exchange by defendants of credit information, financial conditions or other matters which are related to Textura's ability to pay for goods delivered or sold by defendants does not violate the anti-trust laws. Preparation and exchange of such information is a common business practice without which rational credit deci-

sions could not be made.

Plaintiff may prove a conspiracy among defendants to drive Textura out of business by restricting its credit by circumstantial evidence only if defendants acted similarly and these actions were contrary to their own self interest. The record is that Clark-Schwebel put Textura on a cash basis in early March 1966 in response to Textura's attempt to take a $30,000 credit on a quality dispute and referring the matter to its attorneys; Stevens never put Textura on a cash basis and increased its line of credit to Textura in July 1966 to $20,000; allowed Textura's outstanding obligation to increase to $27,000 following July, and in addition in November 1966 made an accommodation to Textura of another $10,000 in credit in order to deliver some goods to one of Textura's customers. The record also shows that Burlington extended credit throughout 1966 except for a brief period in the fall of 1966 when Textura could not keep its account current on 60-day terms. When that happened, Burlington delivered goods to Textura for cash.

If you find that defendants' credit actions in 1966 were not similar, then as a matter of law no inference of a conspiracy may be drawn and you must return a verdict for defendants. If you find defendants credit decisions were similar, plaintiff must also prove by a preponderance of the evidence that defendants' credit decisions were contrary to each defendant's own self-interest, before you can return a verdict for plaintiff Textura. However, as a matter of law, if any defendant restricted plaintiff's credit at a time when it had reason to be concerned about Textura's ability to pay, then such action would not be contrary to that defendant's self-interest. Thus, plaintiff must prove by the preponderance of evidence that the defendants' credit decisions were b ed on some considera-

tion other than Textura's financial conditon or ability to pay.

There is no claim that Burlington or Stevens participated in either Clark-Schwebel's determination to put Textura on a cash basis or to institute an arbitration.

Plaintiff claims that it was forced to settle the arbitration proceeding with defendant Clark-Schwebel. However, as a matter of law, it cannot be found that any such coercion, even if it existed, caused any harm to plaintiff. Mr. Powrie testified that he never had any intention of living up to such an agreement, that he told Clark-Schwebel's representatives that he could not live up to such an agreement and further, the facts show that he did not live up to such an agreement. The uncontradicted evidence is that he used the purported agreement between Textura and Clark-Schwebel as a means of inducing further favorable credit terms from both Stevens and Burlington. In such a situation, plaintiff cannot base any claim on allegedly being forced into an agreement which it never performed or had any intention of performing and which was subsequently twice modified to its benefit.

[See authorities for Tendered Charges 8-12 previously submitted.]

DEFENDANTS' TENDERED INSTRUCTION NO. 13a

Textura has charged a price-fixing violation with respect to industrial fiber glass fabrics. Defendants have admitted that prices were fixed on industrial fabrics at one time. However, I instruct you that no inference is permissible from that fact that defendants conspired to drive Textura out of business. Moreover, you may not find that an illegal overcharge, if any, on industrial fabrics contributed in any way to Textura's bankruptcy, as most of such fabrics were purchased in 1960 or earlier, and none were purchased in 1966.

DEFENDANTS' TENDERED INSTRUCTIONS 13 - 20

WITHDRAWN

DEFENDANTS' TENDERED INSTRUCTION NO. 21

Upon until this point we have referred to the two plaintiffs collectively. However, it is important that you keep them separate in your deliberations and with respect to any verdict that you may return.

In a prior order issued on a pre-trial motion in this case, Judge Ryan, another judge of this same court, found certain facts regarding the plaintiff Powrie to be established. These facts are, and I quote:

> 1. Neither FENESTRA nor POWRIE made or attempted to make purchases from any of the defendants; only TEXTURA did.
>
> 2. Neither FENESTRA nor POWRIE sought an extentions of credit from the defendants.
>
> 3. POWRIE was a shareholder, officer and employee, creditor and customer of TEXTURA.

I instruct you that you must treat these facts as conclusively established, and you, in your deliberations, must take these facts as true. [See Federal Rule of Civil Procedure 56(d); Parmalee v. Chicago Eye Shield Co., 157 F.2d 582, 585 (8th Cir. 1946) and 6 Moore's Federal Practice, ¶ 56.20 [3-3] n.4 (1965).]

Those harmed incidentally by antitrust violations have no standing to sue under the antitrust laws. The law which you must follow in this case holds it is only the "target" of an alleged antitrust violation who can recover and not those who may have suffered economic damage by virtue of their relationships with targets.

[See The Nassau County Association of Insurance Agents v. Aetna Life & Casualty, No. 890, Docket 73-2359 (2d Cir., May 29, 1974);

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972);

Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).]

Applying these general principles to this case, I charge you that plaintiff Powrie can recover no damages which may be claimed in the capacities of employee, stockholder, creditor or guarantor of Textura.

DEFENDANTS' TENDERED INSTRUCTION NO. 22

If you find that defendants' violated the antitrust laws, before you can consider awarding damages, you must also find that Textura has established by a preponderance of the evidence that the injury sustained was proximately caused by an antitrust violation of the defendants. Defendants claim that Textura was not injured by the actions of the defendants, or any of them, in violation of the antitrust laws, but that any injury sustained by Textura resulted from its own failure to run a profitable business. This is an issue which you must decide based on the evidence in this case.

In other words, the law requires proof of a causal connection between any antitrust violation and the injury to plaintiff's business. In order for the plaintiffs to recover damages, it is not enough to show that defendants violated the antitrust law, but it is also necessary for the plaintiffs to establish by a fair preponderance of the evidence that the wrong done proximately resulted in or was the proximate cause of ascertainable damages to its business and property. If the injury to Textura was proximately caused by something other than defendants' action, then the plaintiffs have not established causation and you must find for the defendants.

Plaintiff must prove that injury to its business was a certain result of some wrong done by defendants, and that its damages were definitely attributable to the wrong.

[A substantially similar charge was given in Sonken-Galamba Corp. v. Aluminum Co. of America, Civil No. 14,376 (W.D. Mo. 1966 , repreinted in ABA Antitrust Civil Jury Instructions 179 (1972).]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., ETC., ET AL,

PLAINTIFFS,

-AGAINST-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, ET AL,

DEFENDANTS,

-AND-

VERNES F. GRAFSTROM,

DEFENDANT ON THE COUNTERCLAIM.

CIVIL ACTION NO. 66 CIV. 4230

CAL. NO. 158(2)

CHT

PLAINTIFFS' PROPOSED CHARGES TO THE JURY

In this action Plaintiffs allege a conspiracy among the Defendants and others to fix prices on fiberglass fabrics sold by Defendant weavers to Plaintiff TEXTURA and its predecessor GLASS FABRICS, to coerce TEXTURA into the settlement of an arbitration brought by Defendant CLARK-SCHWEBEL, to withdraw extended credit privileges, stop deliveries, and sell defective fabrics to Plaintiffs, and to circulate false information concerning Plaintiffs POWRIE and TEXTURA, all for illegal objects including the disciplining of TEXTURA for pressing quality complaints against Defendants and for marketing its goods in a manner which displeased more substantial customers of the Defendants. Defendants deny these allegations.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal by Section 1 of the Sherman Antitrust Act. Adams Dairy Co. v. St. Louis Dairy Co., 260 F. 2d 46 (8th Cir. 1958).

Section 4 of the Clayton Act gives, to a person or business injured by violations of the antitrust laws, the right to recover damages from those who have violated the law. Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641 (N.J. 1960).

In order for Plaintiffs to recover in this action, you must find that they have established - by a preponderance of the evidence - that one or more of the Defendants participated in a conspiracy to do the things alleged by Plaintiffs; that these conspiracies or any one of them was the direct and proximate cause of injury to Plaintiffs' business or property; and that it has been damaged in an amount which is reasonably ascertainable in dollars and cents. Gorham & Johnson, Inc. v. Chrysler Corp., 308 F. 2d 462 (5th Cir. 1962).

BROAD DEFINITION OF CONSPIRACY

The antitrust laws are intended to foster and preserve a system of free competitive enterprise; to preserve the fullest practicable competition in the market place, and to prevent the accomplishment of a monopoly in any business or industry. Woods Exploration & Producing Co. v. Aluminum Co. of America, 284

F. Supp. 582 (S.D. Tex. 1968).

Thus, any direct interference by contract, combination, or conspiracy, with the ordinary and usual competitive pricing system on the open market, the freedom of individuals to take action or not to take action according to their own business judgment, the free and unmanipulated negotiation of terms of credit and sale, and the free flow of goods and services, from suppliers to their customers, constitutes an unreasonable restraint of trade, and is in itself unlawful. The mere fact that there may be business justifications for these actions, or the fact that they are otherwise wholly or partially economically reasonable, will not relieve the members of the combination or conspirary from liability under the antitrust laws.

If you find from the evidence in this case that the Defendants, or two or more of them, or any one of them and any Co-Conspirator, have knowingly and wilfully agreed to conspire, whether tacitly or expressly, to raise, lower, maintain or standardize fiberglass fabric prices in any way or manner, or by any means or method, or have conspired to establish a joint policy regarding the extension of credit and/or the flow of goods sold to Plaintiffs or have conspired to drive Plaintiffs out of business, then you must find that such Defendants have violated the antitrust laws. Paramount Loew's v. Warner Bros., cited in ABA, Antitrust Civil Jury Instructions (1972); Kitchen Designers of Houston, Inc. v. Earl McMillan, Inc., Civil No. 65-H-782 (S.D. Tex., Houston D.W.)

GENERAL INSTRUCTIONS

Prior to considering whether Plaintiffs have proved this case, however, there are certain general matters which you must be instructed on:

(1) Plaintiffs may recover if they sustain their claims by a fair preponderance of the evidence, which means simply that it is more likely that the things that the Plaintiffs seek to establish as true, are true, then it is that they are not true. This means that the evidence offered by the Plaintiffs, considered from the point of view of quality and substance, and not how much or how little of it there is when compared to Defendants' evidence, is more worthy of belief than Defendants' evidence. If upon a review of all the evidence you are satisfied that the Plaintiffs have sustained their burden by no matter what degree, that is, if the evidence weighs, even slightly, in their favor, then the Plaintiffs are entitled to recover. If you feel that the evidence is in even balance as between the two sides, then Plaintiffs have failed to carry their burden. Clements v. McGraw Hill Publishing Co., Civil No. 143-51 (S.D.N.Y. 1964).

(2) In the present action, testimony of absent witnesses was read to you by way of deposition. Such testimony is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you from the witness stand. Westcoast Broadcasting Co. v. Jerrold Electronics Corp., 341 F. 2d 653

(9th Cir. 1965).

(3) In general, witnesses are presumed to speak the truth, but this presumption may be overcome as to the testimony of any witness or any part of his testimony by the evidence in the case and all inferences to be drawn therefrom. In determining the credit you should give to a witness and the weight and value you should attach to his or her testimony, you should take into consideration the conduct and appearance of the witness on the stand, the interest of the witness, if any, in the result of the trial, the motive actuating the witness in testifying, the witness's relationship to or feeling for or against any of the parties, the probability or improbability of the witness's statements, the opportunity the witness had to observe or be informed as to matters respecting which the witness gives testimony, and perhaps most importantly, your appraisal of the inclination of the witness to speak truthfully or otherwise. Crown Packers v. Peelers Co., F. Supp. 193 (W. D. Wash. 1966); Washington Public Power Supply Systems v. American Pipe & Construction Co., 274 F. Supp. 961 (W. D. Wash., 1967).

In this action many of the witnesses for either side are what is known as "interested". That is they stand to gain or lose according to the outcome of the trial or they are in the employ of those who stand to gain or lose. Although you are not required to accept or believe the testimony of an interested party to the lawsuit even though there is no direct evidence contradicting or disputing the witness's testimony, the mere fact that a person is an interested witness, does not render him necessarily unworthy of belief. It is only one, among a number of fac-

tors, which you may consider in determining what weight to give to the testimony. Clements v. McGraw Hill Publishing Co., supra.

(4) You have observed that there has been considerable testimony in this case, which may be properly designated as "expert testimony" - in this case, the testimony of persons skilled in accounting and marketing, who have knowledge and experience in relation to such matters which are not within the knowledge of men of common education and experience. You are instructed that such opinion evidence as has been given in this case is competent evidence for your consideration, and in your deliberations you are entitled to give such evidence such weight and value as you may think it entitled, measured by the same standard as you would weigh the evidence of any other competent witness in the case. Adams Dairy Co. v. St. Louis Dairy Co., supra.

(5) Any charts or summaries admitted in evidence are received for the purpose of explaining facts disclosed by books, records, other documents and testimony which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. Such charts or summaries must correctly reflect facts or figures shown by the evidence in the case, in order for you to pay heed to them. In other words, such charts or summaries are used as a matter of convenience, to aid you in considering facts or figures shown by the evidence in the case, and you are to treat them accordingly. Washington Public Power Supply Systems v. American Pipe & Construction Co., supra.

(6) You have been chosen and sworn as jurors in this case to try the issues of fact presented by the evidence. You are to perform your duty as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences. Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967).

It is the duty of this Court to give you these instructions as to the law applicable to this case, and it is your duty as jurors to follow the law as I state it to you in these instructions and to apply the rules of law to the facts as you find them from the evidence in the case. You are not to be concerned with the wisdom of any rule of law which I give you; you are duty-bound to accept the rules of law as I give them to you, even though you might otherwise have your own personal views as to what the law is or should be. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. The evidence in this case consists of the pre-trial admitted facts which were called to your attention, the sworn testimony of the witnesses for all parties, and the parties themselves, all exhibits which have been received in evidence, all facts which have been admitted or stipulated to by the attorneys in Court and you must also consider all applicable presumptions stated in these instructions. Independent Productions Corp. v. Loew's Inc., 148 F. Supp. 460 (S.D.N.Y. 1957); Perkins v. Standard Oil Co. of California, 399 U.S. 222 (1970).

In finding the facts and adjudging whether Plaintiffs have proved their case, you must not consider for any purpose an offer of evidence that was rejected or any evidence that was stricken out by the Court. In addition, and of equal importance, you are instructed that evidence admitted for limited purposes must not be considered for any other purpose. You are to decide the case solely upon the evidence that this has been admitted by the Court and the inferences reasonably to be drawn therefrom. Crown Packers v. Peelers Co., supra. Mere unsupported assertions by counsel in opening statements or in the asking of questions of witnesses do not constitute any evidence whatever in the case, and should be disregarded by you as proof of any facts. Paramount Loew's v. Warner Bros., supra. You should attach no weight to inferences from questions, apart from the sense and meaning of the answers. Paramount Loew's v. Warner Bros., supra. But the arguments of counsel at the close of evidence certainly must be considered by you, for their respective contentions may be helpful in enabling you to search your recollection of the evidence and determine what the evidence actually is. Estate of Le Baron v. Rohm & Haas Co., 441 F. 2d 575 (9th Cir. 1971).

(7) All of the parties Defendant are corporations. In that connection the Court instructs you that a corporation is held to the same measure of liability as an individual. A corporation acts through its officers, directors and agents and may through one or more of them conspire with another corporation or with other individuals. Any act of an officer, director or agent

of a corporation which is done within the scope of his duties or authority you may consider to be an act of the corporation itself. It is not necessary that the corporation specifically authorize the agent to commit such acts or make such statements. A corporation is legally bound by the acts and statements done or made by agents acting within the scope of their express, implied, or apparent authority. By express authority is meant that type of authority specifically given to an agent by his superior. By apparent authority is meant that type of authority which outsiders would normally and naturally assume that the agent would have, in light of his position with the company and the circumstances surrounding his past conduct while with the company. As a practical matter you may consider that all acts done by an employee in pursuance of the business of the corporations for whom he was employed were impliedly authorized acts, for which the employer corporation may be held responsible. Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F. 2d 86 (9th Cir. 1961); Paramount Loew's v. Warner Bros., supra.

SHERMAN ACT-DEFINITIONS

You now must consider the terms of the Sherman Act itself: The meanings of the various terms used in, or in relation to, the Sherman Antitrust Act, such as "conspiracy", "combination", "trade or commerce", "interstate commerce", have been well settled.

A conspiracy is a combination of two or more persons - or corporations as in this case - by concerted action to accomplish some unlawful purpose by lawful or unlawful means, or to accomplish some lawful purpose by unlawful means. Hawaiian Oke & Liquors, Ltd.

v. Joseph C. Seagram & Sons, Inc., supra. So, a conspiracy is a kind of unwritten partnership, or combination, in which each member becomes, in the eyes of the law, the agent of every other member, and each member is charged with responsibility for the acts of all the other members in furtherance of the consp racy, which acts the law assumes each member to have directed or authorized. Paramount Loew's v. Warner Bros., supra.

The term "trade or commerce" includes the weaving and sale of fiberglass fabrics by the Defendants to the Plaintiffs on credit or otherwise and so you need not concern yourself further with this aspect of the Statute. Similarly, the requirement of the Antitrust Act that the "trade of commerce" be "among the several States" is satisfied by the interstate transportation of the fabrics by Defendants to Plaintiffs. Paramount Loew's v. Warner Bros., supra

The purpose of the antitrust laws is to protect the public and individuals from restraints on free competition, and in order for the Plaintiffs to recover they must establish that the conspiracy engaged in by the Defendants was one "in restraint of trade". U.S. v. Eastern Retail Lumber Dealers Ass'n., 234 U.S. 600 (1913). A conspiracy is automatically considered to be in restraint of trade if it results in the elimination of a business or if the result is the fixing of prices or terms such as credit terms upon which two or more competitors sell their goods. Paramount Loew's v. Warner Bros., supra; Poller v. Columbia Broadcasting Syste 368 U.S. 464 (1961); U.S. v. Socony-Vacuum, 310 U.S. 150 (1940). Also in this category are concerted refusals by suppliers to deal with a

customer. Warriner Hermetics Inc. v. Copeland Refrigeration Corp., 463 F. 2d 1002 (5th Cir. 1972); Klor's v. Broadway Hale Stores, 359 U.S. 207 (1959).

In this action Plaintiffs allege conspiracies of all these types. If, therefore, you find that the Defendants conspired to fix prices as to some or all of the fiberglass fabrics sold by them or any of them to TEXTURA or its predecessor GLASS FABRICS, or jointly established at any time a policy regarding the extension of credit and terms of sale to TEXTURA, or agreed to refuse to process orders for TEXTURA, you need not concern yourself further with the question of whether these are conspiracies "in restraint of trade", or whether injury to competition occurred as a result. The law presumes this result. So also in the case of the conspiracy to eliminate Plaintiff from business.

In the case of Plaintiff's charge that the Defendants conspired to coerce him to settle an arbitration with CLARK-SCHWEBEL, the matter is equally clear, since he alleges that the natural and proximate result of the actions taken in furtherance of this conspiracy was the elimination of TEXTURA from business.

PROOF OF CONSPIRACY

Because of their inherent secret nature, conspiracies are rarely proved by direct evidence - but instead are generally proved by what is referred to in the law as circumstantial evidence, that is inferences to be drawn from the totality of Defendants' conduct, acts, communications, associations, and contacts with each other and with the Plaintiffs which suggest to your mind,

logically, an unlawful combination, a confederation, a coming together or a meeting of the minds upon a community of purpose, or of design, and that in some way or manner, or through some contrivance, positively or tacitly, the Defendants came to a mutual understanding to accomplish any one of the results suggested by Plaintiffs. Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra; Paramount Loew's v. Warner Bros., supra.

You are instructed that because the conspiracy is to be proved by circumstantial evidence does not make it any less provable than if it were to be proved by direct evidence. Circumstantial evidence, notwithstanding whatever associations and meaning you may have ascribed to it as laymen, is no less worthy of belief than direct evidence. You are instructed that no less weight is to be given to Plaintiffs' case because of the circumstantial nature of the proof required to establish it. Woods Exploration & Producing Co. v. Aluminum Co. of America, 284 F. Supp. 582 (S.D. Tex. 1968).

In order for Plaintiffs to establish a conspiracy by either direct or circumstantial proof, however, you must make a determination as to the existence of those facts from which Plaintiffs seek to have you draw an inference, where an issue of fact exists. Thus, as to all matters as to which Plaintiff alleges one set of facts are true and Defendants allege that a contrary fact or set of facts is true, you must first find, upon all the evidence, that it is more likely that Plaintiffs' allegations are true than it is that Defendants' allegations are true, before you consider what in-

ference is to be drawn from the facts. This applies to all factual issues in the case, both those pertaining to the conspiracy and those pertaining to damages. Paramount Loew's v. Warner Bros., supra.

With these instructions as a background, you must first determine from all the evidence in the case whether or not a conspiracy existed.

There are two conspiracies alleged here: one to fix prices and a second to restrict credit and deliveries, to coerce settlement of a lawsuit and by such means and the others alleged by Plaintiff to put a company and an individual out of business.

You will first be charged regarding the price-fixing conspiracy.

Plaintiffs have alleged that the Defendants fixed the prices of all fiberglass fabrics sold to them according to a formula based on the cost of the yarn which they all purchased at identical prices. Defendants deny these allegations.

The issues before you are:

1. Have Plaintiffs proved a conspiracy to fix prices on all fabrics sold to them by Defendants?

In making this determination you may consider the following evidence: admissions of price-fixing; Defendants' motive to fix prices; Defendants' opportunity to fix prices; Similarity of Defendants' prices.

2. If so, what are Plaintiffs' damages, if any?

In this connection you should consider the evidence with respect to what prices would have been charged absent a conspiracy.

3. If Plaintiffs have not proved a conspiracy to fix the prices on all fiberglass fabrics, have they proved a conspiracy to fix the prices on industrial fabrics purchased from Defendants and, if so, what are Plaintiffs' damages, if any?

If you find that Defendants' fixed prices on industrial fabrics at various meetings, you may infer from that and other corroborative evidence such as admissions and similarity of prices that Defendants' fixed prices on decorative fabrics as well. Federal Trade Comm. v. Cement Institute, 333 U.S. 683 92 L Ed. 1010; Wood v. United States, 41 U.S. 342; El Ranco, Inc. v. First National Bank of Nevada, 406 F. 2d 1205 (9th Cir. 1968); United States v. Local No. 8, Int. Ass'n. of Bridge, S., O. & R. I., 315 F. Supp. 1202 (W. D. Washington, N. D. 1970); In the Matter of Compudyne Corporation, Debtor, 255 F. Supp. 1004 (E. D. Pennsylvania 1966).

In connection with your price-fixing determinations you are instructed that it is not necessary for you to find that Defendants agreed on the exact prices at which they were to market their fabrics; it is sufficient if you find that the formula or method for arriving at prices or price ranges were agreed upon. U.S. v. Socony Vacuum Oil Co., 301 U.S. 150 (1940).

You must also be charged as to the relationship of the price-fixing conspiracy to the credit conspiracy. Because the Defendants are guilty of one conspiracy does not mean that they are guilty of the other. However, you may consider Defendants involvement in one conspiracy as bearing on their alleged involvement in another on the question of their opportunity and motives for entering into the other conspiracy. cf. FTC v. Cement Institute, 333 U.S. 683 at 705 (testimony of prior or subsequent transactions relevant to show purpose and character of transactions under scrutiny).

Now you must be charged with respect to those of Plaintiffs' allegations regarding what has loosely been termed the "credit conspiracy". A brief review of Plaintiffs' allegations is necessary:

Plaintiff alleges first that the communications from CLARK-SCHWEBEL to BURLINGTON and STEVENS were not, as Defendants claim, the routine exchange of credit information, but instead were unsolicited attempts to induce BURLINGTON and STEVENS to join with CLARK-SCHWEBEL in taking various restrictive acts against Plaintiffs' account, including refusal to process orders, withdrawal of extended credit terms and holding up shipments. This is a question of fact which you must resolve according to the instructions given. If you resolve this question in Plaintiffs' favor, you then must determine whether BURLINGTON or STEVENS by words or conduct accepted the invitation of CLARK-SCHWEBEL to unite with them against TEXTURA for any one of the purposes suggested by Plaintiffs, the most obvious one being to force TEXTURA to drop its claim against CLARK0SCHWEBEL and to accede to a settlement of the arbitration between TEXTURA and CLARK-SCHWEBEL on the terms demanded by CLARK-SCHWEBEL.

Acceptance by competitors of an invitation to parti-

cipate in a plan, the necessary consequence of which, if carried out, is a restraint of commerce, is sufficient to establish conspiracy if you are satisfied that that is the inference to be drawn from the matters proved before you. If you are so satisfied you may presume that acts thereafter taken with respect to the Plaintiffs were in pursuance of that plan. Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra. Of course, the mere fact that CLARK-SCHWEBEL urged such a policy on BURLINGTON and STEVENS and thereafter they adopted that policy is not sufficient to establish conspiracy on the part of BURLINGTON or STEVENS, if the party who is sought to be established as a conspirator simply adopted the policy for reasons of his own without regard to what his competitors did. Paramount Loew's v. Warner Bros., supra. However, if he adopted that policy in reliance on his competitors following a similar policy, and but for that assurance he might have acted differently, then you may find that he is a conspirator acting on a common plan or understanding and liable for his actions under the Antitrust Laws. Turner, Agreement Under the Sherman Act, 75 Harv. L. Rev. 655 (1962).

Therefore what you are to decide ladies and gentlemen of the jury, is whether or not the evidence introduced by Plaintiffs, specifically the internal memoranda of Defendants recording communications between them and actions taken with regard to the account, and the depositions of Defendants used in evidence, suggest to you that the Defendants were acting in a consciously interdependent manner, in which case they are liable under the Antitrust Laws, or whether they would have taken the actions they

took whether or not their competitors took similar actions. If for instance STEVENS determined that it would only process new orders if BURLINGTON would or would only extend credit if BURLINGTON would, this would be strong evidence that it was acting in a conspiratorial manner, pursuant to a common understanding.

BUSINESS REASONS IRRELEVANT IF AGREEMENT FOUND

You now must be charged regarding an important aspect of this case - how you are to determine whether the inference which Plaintiffs seek to have you draw from Defendants' communications and activities or the inference which Defendants seek to have you draw is the correct one. As has been indicated the question turns on whether or not on the basis of all of the evidence presented it is more likely that Defendants were acting in a consciously interdependent manner or whether it is more likely that they each were acting individually, pursuing interests of their own without any real regard, other than from the point of view of it aiding in establishing their own policy, to what their competitors were doing.

In making this determination you must consider the business picture presented by Plaintiff TEXTURA'S account and any other factors at the time of the events complained of, for Defendants contend that their actions were individual responses to an economic situation which demanded those responses. This is often referred to as the "business reasons" for Defendants' actions, as opposed to anti-competitive motives or reasons, and your task is to determine upon all the evidence whether the actions taken by Defendants are more likely explicable according to business reasons

as claimed by Defendants, or on the basis of the anti-competitive motives or reasons, as alleged by Plaintiffs.

However, business reasons are to be considered by you in determining if there was agreement among the Defendants. They are not relevant if and once you find that a common plan existed. If you are satisfied that conspiracy is the proper inference to be drawn from the evidence presented, you need not consider whether any of the parties to the understanding, that is any of the Defendants had other "business" or other good reasons for taking the actions that they took with respect to the TEXTURA account. Delaware Valley Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (E.D. Pa. 1960). In other words, evidence tending to show that there was a legitimate business reason for the acts of Defendants in refusing to deal or taking other restrictive action against Plaintiff is admissible to refute the existence of a conspiracy based upon circumstantial evidence. But if the over-all evidence is sufficient to support an inference that the Defendants entered into a conspiracy, the fact that a Defendant's individual activities may be explainable as a reasonable business decision will not justify his conduct or deprive it of its illegal character.

UNTIMATE ISSUE

With this in mind, you must determine whether or not the actions taken by BURLINGTON, STEVENS and CLARK-SCHWEBEL were as they contend the result of legitimate business considerations based on the credit performance of TEXTURA; wholly personal and individual disputes between these Defendants and TEXTURA; in the case of BURLINGTON and STEVENS, fear of loss in the event of CLARK-SCHWEBEL'S success in the arbitration; or whether these alleged reasons were merely utilized by the Defendants as an excuse or a device to withdraw the extended credit privileges theretofore extended to TEXTURA, and to restrict the flow of goods, in order

to accomplish one or more of the purposes suggested by Plaintiffs; namely, to coerce Plaintiffs into desisting from pursuing quality complaints against the Defendants or any one or more of them, to enable CLARK-SCHWEBEL to prevail on its claim against TEXTURA without the necessity of submitting it to arbitration, or, ultimately, to eliminate TEXTURA from the fiberglass fabrics business on account of Defendants dislike of its selling methods.

In considering this question, you must consider whether or not sufficient anti-competitive motive has been established by the Plaintiffs so that the inference of conspiracy suggested by Plaintiffs to be drawn from the activities of the Defendants, including both their communications among one another and their activities with respect to Plaintiffs account, is a logical one. You must decide whether it is logical to infer from the evidence in the case that Defendants were motivated to act in each other's interest and against TEXTURA on account of (a) TEXTURA'S persistent quality complaints and insistence that it receive special treatment in the matter of quality and credit, (b) complaints from customers about TEXTURA'S selling methods, (c) the potential injurious effect of TEXTURA'S selling methods on industry marketing practices and hence Defendants' profits, (d) the desire to do a favor, and, conceivably, unwillingness to refuse a favor, to CLARK-SCHWEBEL on account of its close personal relationship with the other two Defendants and its involvement with the other two Defendants in a price-fixing conspiracy of which SCHWEBEL had been a leader. Adams Dairy Co. v. St. Louis Dairy Co., supra; Crown Packers v. Peelers Co., supra.

Any of these motives, if believed, could be sufficient

to justify an interpretation, in their light, of the communications and actions of the Defendants and Co-Conspirators as unlawful

Furthermore, if the reasons which the Defendants have ascribed for any actions taken with respect to the Plaintiff's account seem to you not to be advanced in good faith, and if they appear to you on the basis of all the evidence including your judgment as to the credibility of the witnesses, to be not the real reason for such actions, then these are circumstances which you may take into consideration in determining whether such actions were the result of and in pursuance of a conspiracy against the Plaintiffs. Paramount Loew's v. Warner Bros., supra.

In addition, you may determine that the reasons alleged by Defendants for taking the actions that they did were not in fact legitimate business reasons. Delaware Valley Marine Supply Co. v. American Tobacco Co., supra.

Plaintiffs allege that their business was on the upturn in 1966; that their sales and profits were up while their credit standing with Defendants was better than ever; that this was known to and admitted by Defendants; that Defendants' actions in limiting Plaintiffs' credit, holding up shipments and refusing to process orders were unprecedented in scope and intensity and can only be explained by the theory of united action to force TEXTURA to drop its quality claims, and settle the CLARK-SCHWEBEL arbitration, thereby forcing Plaintiff out of business. Defendants claim that their actions in 1966 represent the continuation of long standing policies regarding the TEXTURA account and that the credit picture

presented by TEXTURA in 1966 justified their actions. You must determine which of these interpretations is true. In making this determination, you must decide whether the credit picture presented by the Plaintiffs to each of the Defendants was such as to justify on an individual basis the action taken by each of them. In doing this you must consider the credit relationship between TEXTURA and its predecessor, GLASS FABRICS, on the one hand, and each of the Defendants on the other for the years prior to 1966 and the credit policies pursued by each of the Defendants in those years, contrasted with the credit picture presented by TEXTURA in 1966 and the actions taken by Defendants in 1966. What you are ultimately to determine is whether or not there was a change in policy by any two of the Defendants, or any Defendant and any Co-Conspirator toward TEXTURA in 1966 and whether that change in policy was justified by the credit picture presented by TEXTURA. If you find that (1) there was a change in any Defendant's policy toward TEXTURA with regard to credit and the processing of orders in the spring and early summer of 1966 and (2) that change was not justified by the relative economic condition of TEXTURA at that time or any other factors alleged by Defendants, you may find that Defendants' alleged "business reasons" for restricting credit and refusing to process orders were untrue. Statements of the Defendants or Co-Conspirators about the state of Plaintiffs' account in 1966 are to be considered by you in making this determination.

In this connection you must consider also what effect the CLARK-SCHWEBEL arbitration had on the credit picture presented by Plaintiffs. This is perhaps the thorniest issue in this case and there are certain factual issues which you must resolve in connection with it. The merits of the quality claim by TEXTURA

against CLARK-SCHWEBEL are not before you; nor are the merits of the claim by CLARK-SCHWEBEL against TEXTURA in arbitration. Who would have prevailed in arbitration is not relevant to this case. However, Plaintiffs contend that the settlement terms demanded by CLARK-SCHWEBEL represented a virtually total abdication of TEXTURA'S own position and a complete windfall for CLARK-SCHWEBEL, in that it, among other things, forced TEXTURA to agree to take in and pay for goods which TEXTURA could not market due to blatant quality defects and in that it completely wiped out TEXTURA'S ability to do business with CLARK-SCHWEBEL; - in short that the settlement terms were punitive, designed to wipe TEXTURA out by eliminating its cash position and to save CLARK-SCHWEBEL from any significant loss on quality. Defendants deny these allegations. To the extent that this position is sustained by Plaintiffs, it becomes relevant to the question of liability and damages as hereinafter set forth. Plaintiffs contend (1) that Defendants BURLINGTON and STEVENS knew that the settlement terms represented a total surrender by TEXTURA, gave an unconscionable total victory to CLARK-SCHWEBEL, and were punitive and impossible of performance by TEXTURA without bankrupting it and (2) that they advised TEXTURA expressly or by implication that if it did not settle the arbitration with CLARK-SCHWEBEL that they would take or continue action, including the limitation of credit and the refusal to process orders, the effect of which would be to so severely hamper TEXTURA'S operations that it could not continue in business. Defendants deny that they knew of the terms demanded by CLARK-SCHWEBEL, whether TEXTURA would be able to meet the terms, or that they directly or indirectly coerced TEXTURA to settle with CLARK-SCHWEBEL.

If you find in Plaintiffs' favor on these questions, that is, that Defendants knew of the punitive terms and did coerce TEXTURA to settle, you must then determine whether BURLINGTON and/or STEVENS activities in so coercing TEXTURA were pursuant to a common understanding with CLARK-SCHWEBEL or any Co-Conspirator. While it is true that the legality of such pressure tactics by any individual Defendant is not in issue here, you may consider the fact that the direct beneficiary of such tactis was CLARK-SCHWEBEL, and not BURLINGTON or STEVENS, as strong evidence that a conspiracy was afoot. See Turner, Agreement Under The Sherman Act, supra.

Finally, you must consider whether BURLINGTON and STEVENS were in fact benefited by TEXTURA'S settling the arbitration on the terms demanded by CLARK-SCHWEBEL. If, as Plaintiffs allege, TEXTURA could not have met the terms without going under and Defendants knew this, you must conclude that Defendants' insistence that TEXTURA settle with CLARK-SCHWEBEL was prompted by anti-competitive motives. You may also consider that Defendants were large corporations with sophistication in credit matters who must be presumed to ordinarily act on the basis of research and knowledge. In this light, you must determine whether their coercive actions were legitimately motivated in the light of what actually happened to Plaintiffs as a result of these actions - to wit, bankruptcy. This assumes, of course, that you find that TEXTURA'S failure was proximately caused in whole or in part by the Defendants acts. But if you so find, you are instructed that the fact that TEXTURA went under is one element which you may consider

in determining whether Defendants' credit policies were legitimately motivated for it represents a failure of their policies. You may also consider, in the light of the size and sophistication of Defendants STEVENS and BURLINGTON'S credit departments, the extent of the inquiry made by either of them to ascertain whether TEXTURA'S claims against CLARK-SCHWEBEL in the matter of quality were well documented and in this light you may consider the fact that each Defendant was an experienced fiberglass weaver and that BURLINGTON had an extensive experience of quality difficulties with TEXTURA. Ultimately, as expressed before, the question is: was there a foreseeable benefit to STEVENS and BURLINGTON in forcing TEXTURA to settle with CLARK-SCHWEBEL or are their actions more plausibly explained on a theory of a desire to benefit CLARK-SCHWEBEL or one of the other anti-competitive motives supplied by Plaintiffs.

DOMMERICH CONSPIRACY

Plaintiffs also allege a conspiracy among Defendants, particularly CLARK-SCHWEBEL, and DOMMERICH or MOSKOWITZ to circulate false information concerning Plaintiff POWRIE and the TEXTURA account with a view toward inducing others to restrict TEXTURA'S credit, demand guarantees and to otherwise refuse to deal with TEXTURA, and, on the part of DOMMERICH, to withhold monies legitimately due TEXTURA with a view toward strangling its cash flow and ultimately eliminating it from business. You are to apply the same rules in determining whether such a conspiracy existed as you are in determining all such other questions, according to these instructions.

You must, of course, first determine whether in fact

false information was circulated by CLARK-SCHWEBEL and DOMMERICH. If you so find, then you must determine secondly whether this was done pursuant to a conspiracy by CLARK-SCHWEBEL with DOMMERICH or MOSKOWITZ. You may consider, if you find it to be so, that both parties distributed essentially the same kind of false information as indicating that some mutual understanding existed between them on this point.

MEANS TO INDUCE AGREEMENT IRRELEVANT

A subtle distinction must be made at this point. You may find that DOMMERICH and CLARK-SCHWEBEL collaborated to spread false information concerning Plaintiff POWRIE and his business TEXTURA. This is one conspiracy. Plaintiffs also allege, and this has been the subject of much of these charges, a conspiracy among all three Defendants to restrict credit and the flow of goods to TEXTURA which grew out of CLARK-SCHWEBEL'S requests and inducements to the others to join with them and aid them in coercing and harassing TEXTURA. Plaintiffs also allege that DOMMERICH joined this conspiracy at the instance of NORDHEIM and actively assisted it by withholding monies legitimately due TEXTURA and by cancelling its contract at a time when TEXTURA was doing better than it had ever done. You must, of course, initially determine whether in fact DOMMERICH did withhold monies. If you do, you must then determine whether its actions were taken at the instance of and pursuant to mutual understanding with CLARK-SCHWEBEL or were taken on its own initiative, and the same rules

must be applied by you in making this determination, to wit, whether, given the picture presented by Plaintiffs at the time the actions were taken (and there are issues of fact for you to decide in connection therewith), DOMMERICH'S actions are more explicable on a theory of conspiracy or on a theory of legitimate action to protect its investment.

However, you are instructed that the fact that BURLINGTON, STEVENS and/or DOMMERICH may have joined the conspiracy as a result of false information circulated about Plaintiff's account by CLARK-SCHWEBEL will not excuse them if in fact you find on all the evidence that they became parties to a conspiracy. Conspirators may join a conspiracy as a result of misrepresentations made to them or economic duress applied against them. Otto Milk Co. v. United Dairy Farmers Cooperative Ass'n., 261 F. Supp. 381 (D. C. a. 1966), aff'd 388 F. 2d 789 (1967). The Plaintiff is not responsible for how the conspiracy came about; it is enough if he shows that a conspiracy was formed, by whatever means, and that he was injured thereby.

In determining whether Defendants acted pursuant to legitimate business considerations, you are only to consider facts actually known to the Defendants at the time they took action. This is because if the Defendants, as they claim, acted upon legitimate business considerations, those business considerations could only be based on the stated facts as they then believed them to be, so that if you find that the known facts concerning TEXTURA'S financial picture showed a profitable picture and good prospects in 1966 as against prior years, you must consider only this in determining whether or not Defendants' activities were justified.

You are further instructed that the mere fact that the Defendant suppliers may have had, pursuant to their several contracts with Plaintiffs, the right, individually, to take one or more of the actions referred to above and taken by them with respect to Plaintiffs account is of no consequence to this action. Unlawful conspiracy under the antitrust laws encompasses a joint agreement to exercise rights that would be lawful if done individually. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). It is the element of agreement in restraint of trade that renders such actions unlawful. If, therefore, you find that under the instructions previously given a combination and common plan, tacit or express, had been arrived at by two or more persons, you are instructed to disregard whether the actions taken by them, if taken alone, would have been right and legal. Paramount Loew's v. Warner Bros., supra.

Conversely, the fact that the Plaintiffs may have been in breach of contract with one or more of the Defendants will not avail the Defendants as a defense if you find they conspired to violate the antitrust laws. Specifically, it is no defense to a conspiracy to restrict credit that Plaintiffs were late in paying, if you find that to be so. Even if the Defendants' conspiracy consisted of jointly agreeing to force the Plaintiffs to adhere to legal arrangements between them, it is still a conspiracy in restraint of trade. Paramount Loew's v. Warner Bros., supra.

ADDITIONAL PARTICULAR INSTRUCTIONS REGARDING CONSPIRACIES

You are instructed that when persons are shown to have entered into a conspiracy violative of the antitrust laws,

it will not be assumed that it has been abandoned without clear proof. Therefore, if you should find by a fair preponderance of the evidence that an overall conspiracy was formed with any of the objects previously described, that is, that any of such conspiracies did in fact exist, then you may not assume that it was abandoned without proof to that effect offered by the Defendants. Paramount Loew's v. Warner Bros., supra.

With regard to pricing and terms of credit, a combination or conspiracy to fix prices and terms may be an agreement, or understanding to fix uniform and unreasonably high prices but need not be on stringent terms. Any combination or conspiracy to raise, lower, lengthen, shorten, stabilize or to refrain from competing in these matters, or to refuse to deal with a mutual customer, between competitors is illegal. In short, the Sherman Act unequivocally condemns any agreement or understanding between competitors which tampers with the prices and terms at which they sell to others. Utah Pie Co. v. Continental Baking Co., Inc., 349 F. 2d 122 (10th Cir. 1965); Diamond Block & Gravel Co. v. Alloy Building Prod. Co., 269 F. 2d 950 (10th Cir. 1959). Furthermore, it is not necessary for you to find that Defendants agreed to take identical action against TEXTURA or that prices fixed by them were identical. If you find that agreement existed, you may find that any restrictive actions taken by Defendants were within its terms.

> "A person may be a member of a conspiracy without having any knowledge of what other alleged conspirators are doing at any time, and without necessarily doing the same thing as other conspirators at the same time, and each may be a member of the same conspiracy although their activities may all be in different directions, so long as they are

all intended to contribute to the common end.
U.S. v. Atlantic Co. (DC Ga. 1950) 1950-1951
Trade Cases ¶62,717."

If you determine that a conspiracy existed and that a certain Defendant was a member thereof, then you may consider against him the statements or declarations, written or oral, made by any other person found by you to be a member of the conspiracy. Even though such statements or declarations of one Defendant member may have been made without the knowledge of the other Defendant member, they may be considered by you as against the latter Defendant, provided, however, that such statements or declarations are found by you have been made in furtherance of a purpose or object of the conspiracy pleaded in this Complaint. Kitchen Designers of Houston, Inc. v. Earl McMillan, Inc., supra; Paramount Loew's v. Warner Bros., supra.

It is not necessary for the Plaintiffs to show that the Defendants or any one of them carried out the combination by all the methods contended by the Plaintiffs. It is only necessary that Plaintiffs prove the combination or conspiracy, and that at least one act performed in furthering the conspiracy did in fact cause damage to the Plaintiffs. Paramount Loew's v. Warner Bros., supra.

To establish a combination or conspiracy in restraint of trade, it is not necessary to prove that all of the participants formed or joined the combination simultaneously. A person may be found to have joined a combination or conspiracy which is already in existence. Such a person, by knowingly becoming a party to the

combination or conspiracy, becomes liable and responsible in law for those acts of the members of the combination or conspiracy which were performed prior to the time that the new participant joined in it. Pacific Lanes, Inc. v. Washington State Bowling Proprietors Assn., 356 F. 2d 371 (9th Cir. 1966).

In order to constitute a violation of the Sherman Antitrust Act, it is not essential that you should find a specific intent to unreasonably restrain commerce, provided such a restraint is the direct, immediate, and necessary result of the combination. In these circumstances, wilfull purpose or conscious design to violate the law and inflict injury need not be established for persons so combining will be presumed to have intended the natural and necessary consequence of their acts and agreements. U.S. v. Patten, 226 U.S. 525 (1913). The Plaintiffs, however, must establish that the Defendants participated with knowledge in a plan with the intent to accomplish an unlawful purpose. "Knowledge" and "intent" are mental elements and are difficult to prove by direct evidence. The existence of such elements may be inferred, however, from acts and conduct. It is impossible, as you know, to look into a person's mind and determine what existed at a given time. Intent and knowledge may be inferred from acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances. Paramount Loew's v. Warner Bros., supra; Kenmore-Louis Theatres, Inc. v. Loew's Boston Theatres, Inc., Civil No. 59-184-5 (D. Mass. 1963).

There can be no conspiracy unless more than one person or corporation is involved. On the other hand, you need not find that all three of the Defendants were engaged in the conspiracy in order to find for the Plaintiffs. It is sufficient if any one

of the Defendants was engaged in a conspiracy with any other Defendant or even a non-Defendant Co-Conspirator. Gorham & Johnson, Inc. v. Chrysler Corp., 308 F. 2d 462 (5th Cir. 1962).

DAMAGES

Next, you must consider whether the antitrust violations of the Defendants alleged by Plaintiffs, to wit, the withdrawing of its extended credit terms, the refusals to process orders, the hold ups and refusals to deliver, and the delivery of shoddy merchandise to the extent that you have found said actions (a) to have taken place and (b) to have been part of the conspiracy, proximately caused loss and damage to the business or property of Plaintiffs. Clements v. McGraw Hill Publishing Co., supra. Plaintiffs allege that the following caused them damage and ultimately drove them out of business:

(1) The elimination of their cash - due to the necessity of their purchasing from CLARK-SCHWEBEL on cash; due to the withholding of monies by DOMMERICH, and due to the necessity of complying with BURLINGTON and STEVENS requirements to pay within 60 and 30 day terms and other restrictions imposed.

(2) The loss of sales - due to BURLINGTON'S ceasing delivery on their important fabrics; due to delayed and poor quality deliveres on other fabrics; due to the taking away of the time of POWRIE and other salesmen because of harassment and the necessity of attempting to move poor quality goods required to be taken in by the CLARK-SCHWEBEL settlement, and due to refusals by Defendants to sell certain fabrics to them and to process new orders.

In order to find for the Plaintiffs you must find that one or more of these violations caused damage to the Plaintiffs.

In this regard, you need not determine that these violations were the sole cause of loss or damage to the Plaintiffs nor must Plaintiffs exhaust all possible alternative sources of damage. There may be more than one proximate cause of an event. Id. Proximate cause will exist and it is sufficient if Plaintiffs establish that any antitrust violation of the Defendants, or a combination of them, was a material cause of TEXTURA going out of business. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

In the event that you find by a preponderance of the evidence that the Defendants have committed an antitrust violation and that such violation has proximately damaged the business and/or property of the Plaintiffs TEXTURA or POWRIE, you must then proceed to make a just and reasonable estimate of the amount of damages to be awarded to the Plaintiffs based upon all of the relevant evidence produced at trial.

With respect to the amount of damages, you are instructed that Plaintiffs are entitled to recover from the Defendants that amount of money which will fairly and reasonably compensate them for all of the actual damage done to their business and property by the illegal acts of the Defendants, thereby putting the Plaintiffs in as good a position, to the extent monetary reimbursement can do such, as they would have been had the Defendants committed no antitrust violation and had there been no injury to the Plaintiffs as a result of such violation. Volasco Products Co. v.

Lloyd A. Fry Roofing Co., supra; F. L. Mendez & Co. v. General Motors Corp., 161 F. 2d 695 (7th Cir. 1947); Utah Pie Co. v. Continental Baking Co., supra. The burden of establishing the extent and amount of damages in this case is on the Plaintiffs. Diamond Block & Gravel Co. v. Atlas Building Products Co., supra. However, the burden of proof of the Plaintiffs will be satisfied if the preponderance of the evidence produced at trial affords a reasonable basis for computation of the probable amount of damages. Washington Public Power Supply Systems v. American Pipe and Construction Co., supra. Although the law does not permit you to award damages which are speculative, remote or uncertain, it does not require you to determine the amount of damages with absolute mathematical accuracy, certainty or exaction. Adams Dairy Co. v. St. Louis Dairy Co., supra; Diamond Block & Gravel Co. v. Atlas Building Products Co., supra. It is therefore a sufficient basis to award damages if by a preponderance of the evidence the Plaintiffs have established facts permitting you to approximate or estimate the probable extent or amount of their damages with reasonable accuracy by means of just and reasonable inference. Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp. 924 (D. Me. 1969); Washington Public Power Supply Systems v. American Pipe & Construction Co., supra; Utah Pie Co. v. Continental Baking Co., supra; Adams Dairy Co. v. St. Louis Dairy Co., supra.

In this connection, you are instructed that if the antitrust violations of the Defendants have rendered difficult ascertainment of the precise amount of damages suffered by the Plaintiffs, the Defendants are not absolved from liability. The Defendants may not benefit or take advantage of their wrongs by

claiming that the damages to Plaintiffs are too uncertain if there is a sufficient basis for approximateion of such damages. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Farmington Dowel Products Co. v. Forster Mfg. Co., supra. My instructions on damages to this point have been limited to the general rules you must apply in assessing the amount of damages, if any, to award the Plaintiffs. I will now instruct you on the rules you must consider in evaluating each specific element of damage which the Plaintiffs claim. In this case, the Plaintiffs have made four (4) separate claims for damages: (1) loss of net operating profits of TEXTURA for the period of time commencing with the date upon which the Defendants' conspiracy arose until the date when TEXTURA was forced to cease operations and make an assignment of assets for the benefit of creditors; (2) loss of profits to TEXTURA for the period after it ceased operations; (3) the loss of salary to POWRIE after TEXTURA went out of business; and (4) the loss to POWRIE resulting from his payments as a guarantor on obligations TEXTURA could not meet or for paying loans which he assumed for TEXTURA which TEXTURA could not repay. In connection with any of these claims for damages, you are instructed that any damages which you may find GLASS FABRICS, INC. suffered as a result of Defendants' activities belong under law to Plaintiff TEXTURA and accordingly if you find such damages they should be included in your award of damages, if any, to Plaintiff TEXTURA. I will now charge you on the law with respect to each of these four claims:

(1) LOST OPERATING PROFITS TO TEXTURA

The first element of damage which Plaintiff TEXTURA seeks to recover is the amount of net profits (or decreased

expenses) if any, which would have been made or were incurred by TEXTURA from its operations from the time when the Defendants' conspiracy began until the time TEXTURA ceased doing business, had the illegal activities of the Defendants not occurred. The net profits of a business, as distinguished from its gross profits, are computed by subtracting the costs and expenses of doing business from the gross revenues received by the business. Delaware Valley Marine Supply Co. v. American Tobacco Co., supra. In computing the amount of damages for lost profits, therefore, you must determine, based upon all of the evidence, what the gross revenues of TEXTURA would reasonably have been during the period of Defendants' wrongful conduct in the absence of such conduct and subtract from that amount TEXTURA'S cost and expense in generating such revenues during that time period. In making these determinations, you may consider all of the evidence in the record relating to this subject including expert testimony, exh ibits admitted at trial, whether the business trend of TEXTURA was improving, Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., supra, whether there was a market for TEXTURA'S product, Id., evidence of the expenses and income of TEXTURA for a reasonable length of time before as well as during the conspiracy, Siegfried v. Kansas City Star Co., 193 F. Supp. 427 (W.D. Mo. 1961), profit and loss statements and other business records of TEXTURA, the general future of the fiberglass fabric business, and generally, any other evidence bearing on the issue of lost profi s. You are instructed that the amount of net profits realized by TEXTURA prior to the conspiratorial period is not necessarily a maximum limitation on the amount of profits which TEXTURA would have made in the absence of the conspiracy. Adams Dairy Co. v. St. Louis Dairy Co., supra; Terrell

v. Household Goods Carrier Bureau, 494 F. 2d 16 (5th Cir. 1974).

In addition, Plaintiffs are entitled to recover any damages proximately resulting from illegal price-fixing activities of the Defendants. Accordingly, if you find that Plaintiffs have established by a preponderance of the evidence that the Defendants engaged in price-fixing to the detriment of Plaintiffs, Plaintiffs are entitled to recover the difference between the amounts actually realized by Plaintiffs and the amounts which would have been realized from sales but for the price-fixing conspiracy of the Defendants. Story Parchment Co. v. Patterson P. Paper Co., 282 U.S. 669 (1931); Ohio Valley Electric Corp. v. General Electric Co., 244 F. Supp. 914 (S.D.N.Y. 1965). Moreover, TEXTURA, apart from whether or not it would have made net profits, is entitled to recover any additional expenses it incurred as a result of the conspiracy e.g. increased cost of goods due to the price-fixing conspiracy. Advance Business Systems & Supply Co. v. SCM Corp., 415 F. 2d 55 (4th Cir. 1969). Again, as I previously instructed you, although Plaintiffs have the burden of establishing the amount of net profits or sales lost or the extent of price-fixing damages occasioned as a result of Defendants antitrust violation, Plaintiffs are not required to prove with mathematical accuracy the precise amount of such damages. If there is a reasonable basis in all of the evidence presented for you to compute or estimate the amount of lost net profuts or sales or the extent of price-fixing, that is sufficient for you to award damages to the Plaintiffs, even though the damages are only an approximation.

(2) LOST PROFITS TO TEXTURA AFTER CESSATION OF ITS BUSINESS

The second of the four (4) damage claims which the Plaintiffs seek to recover is the lost profits of TEXTURA after it was forced to terminate its business as a result of the Defendants' illegal conduct. At this point, I think it is important to emphasize to you that any or all of the four elements of damage claimed by the Plaintiffs can be awarded by you, without such award constituting a duplicative recovery. Accordingly, you are permitted to award damages for loss of net operating profits or price-fixing in accordance with the instructions I just gave you and also to award damages for profits TEXTURA lost by being forced out of the business. Volasco Products Co. v. Lloyd A. Fry Roofing Co., supra. This latter category of lost profits is determined by projecting the amount of net profits which TEXTURA would have made from that date until a reasonable point in time in the future, discounted to their present value, had TEXTURA not been forced to terminate its operations by the wrongful activities of the Defendants. Farmington Dowel Products Co. v. Forster Mfg. Co., supra; Lehrman v. Gulf Oil Corporation, 464 F. 2d 26 (5th Cir. 1972); Lessig v. Tidewater Oil Co., 327 F. 2d 459 (9th Cir. 1964). With respect to computing the diminished value of the business and property of TEXTURA by means of projecting the net profits which TEXTURA would have made but for the Defendants' wrongful conduct for a reasonable period of time in the future and discounting that amount to its present value, you may consider all of the evidence I instructed you to consider previously in connection with

computing the amount of lost operating profits. In determining the number of years which is a reasonable period of time for projecting future profits, there is no established rule. In deciding what is a reasonable period of time, however, you may consider the length of time TEXTURA was in business prior to the Defendants' antitrust violations, Lehrman v. Gulf Oil Corporation, supra, as well as the stability of TEXTURA at such time. Farmington Dowel Products Co. v. Forster Mfg. Co., supra. After you have determined the amount of net profits TEXTURA would have made in the absence of the Defendants illegal activity for a reasonable period of time, you must then discount such amount to its present value. In discounting the amount of projected net profits, I instruct you that you must multiply the amount of lost net profits determined by you by ***% in calculating their discounted value. Again, in computing the amount of projected net profits, you are not required to ascertain such amount with absolute mathematical certainty. If there is a reasonable basis in the evidence for you to make a probable estimate of the net profits, it is proper for you to make an award of damages to the Plaintiffs.

(3) POWRIE'S SALARY

The third element of damages sought in this case is the salary which Plaintiff POWRIE, the President of Plaintiff TEXTURA, lost as a result of the illegal conduct of the Defendants which forced TEXTURA out of business. I instruct you that in the event you conclude that TEXTURA was forced to cease operations as a result of the Defendants' antitrust violations, you may award Plaintiff POWRIE damages in the amount of the salary he would other-

wise have received for a reasonable period of time in the absence of the Defendants unlawful conduct. Vandervelde v. Put And Call Brokers And Dealers Assn., 344 F. Supp. 118 (S.D.N.Y. 1972); Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386 (S.D.N.Y. 1967).

(4) FINANCIAL LOSS TO POWRIE AS A GUARANTOR OR MAKER OF LOANS TO TEXTURA

The fourth and final claim of damages by Plaintiffs is for the loss to Plaintiff POWRIE with respect to loans made to TEXTURA or guarantee payments made to third parties by POWRIE on account of loans which TEXTURA was unable to repay because it was forced to cease doing business. I instruct you that if you find that Defendants' illegal conduct proximately resulted in TEXTURA ceasing to continue its operations, you may award damages to POWRIE in the amount of the loans and guarantee payments made by POWRIE to TEXTURA or third parties which would have been repaid by TEXTURA if the Defendants antitrust violations had not forced TEXTURA to terminate its operations. Chattanooga Foundry And Pipe Work v. Atlanta, 203 U.S. 390 (1906).

Finally, I want to emphasize again my previous charge that you are permitted to award Plaintiffs damages for any one, all or none of the elements with respect to which I have just instructed you. Once again, any award of damages does not require mathematical precision and can properly represent a probable estimate reasonably based on evidence adduced at trial provided there is a reasonable basis in the evidence adduced at trial

from which you may make a probable estimate, although the result be only approximate. Nevertheless, the fact that I have instructed you with respect to damages is not to be taken by you as an indication that I think or I do not think that Plaintiffs are entitled to recover damages. Such instructions are given to you solely to guide you in arriving at the amount to which Plaintiffs are entitled, only in the event that you find from a preponderance of the evidence under the goregoing instructions that Plaintiffs are entitled to recover. If from the evidence and the instructions you find that Plaintiffs are not entitled to recover, then, of course, you are to disregard entirely the instructions which I have given you concerning damages. Delaware Valley Marine Supply Co. v. American Tobacco Co., supra.

Respectfully Submitted,

REGAN COLDFARB HELLER WETZLER & QUINN
ATTORNEYS FOR PLAINTIFFS
AND DEFENDANT ON THE COUNTERCLAIM
445 Park Avenue
New York, New York 10022
Tel. No. 754-3000

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated

Yours, etc.,

REGAN GOLDFARB HELLER WETZLER & QUINN

Attorneys for

Office and Post Office Address

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

REGAN GOLDFARB HELLER WETZLER & QUINN

Attorneys for

Office and Post Office Address

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 6[illegible] CIV. 4230 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., ETC., ET AL,

PLAINTIFFS,

-AGAINST-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, ET AL,

DEFENDANTS,

ETC.

PLAINTIFFS' PROPOSED CHARGES TO THE JURY

REGAN GOLDFARB HELLER WETZLER & QUINN
PLAINTIFFS AND DEFENDANT
Attorneys for ON THE COUNTERCLAIM
Office and Post Office Address, Telephone

445 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

(212) PLAZA 4-3000

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

266

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is in the within action; deponent has read

Check Applicable Box

☐ Individual Verification the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

The name signed must be printed beneath

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, Trustee of TEXTURA LTD., In Bankruptcy Proceedings
FENESTRA FABRICS, INC., and
MALCOLM G. POWRIE
Plaintiffs

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION
BURLINGTON INDUSTRIES, INC., and
J. P. STEVENS & COMPANY, INC.
Defendants

-and-

VERNES GRAFSTROM
Defendant on Counterclaim

66 Civil 4230 (CHT)

JUDGMENT
#74,905

The issues in the above entitled action having been brought on regularly for trial before the Honorable Charles H. Tenney, United States District Judge, and a jury, on October 15,16,17,18,21,22,23, 24,25,28,30,31, November 1,6,7,11,12,14 and 18, 1974, and the Court having submitted the attached questions to the jury, and the jury having answered the said questions, and the jury having returned a verdict in favor of plaintiffs Textura Ltd., and Malcolm G. Powrie as against Burlington and Clark-Schwebel, and against defendant J. P. Stevens, and the Court having granted defendants' motion on the issue of price fixing in the decorative fiber glass fabric industry, and dismissing complaint as to Fenestra Fabrics Inc., and defendants having reserved their right to move prusuant to Rule 50, of the Federal Rules of Civil Procedure, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff TEXTURA, LTD., have judgment against defendants BURLINGTON INDUSTRIES INC., and CLARK-SCHWEBEL FIBER GLASS CORP., in the amount of $531,617., (Trebled) for the total sum of $1,594,851., and it is further,

ORDERED, ADJUDGED and DECREED: That plaintiff TEXTURA, LTD., have judgment against defendant J. P. STEVENS & COMPANY, INC., in the amount of $22.40., (Trebled) for a total sum of $67.20., and it is further,

ORDERED, ADJUDGED and DECREED: That plaintiff TEXTURA LTD., have judgment against defendant MANHATTAN INDUSTRIES, INC., in the amount of $77.16., (Trebled) for a total sum of $231.48., and it is further,

ORDERED: That plaintiffs TEXTURA LTD., and MALCOLM J. POWRIE, and defendant on the counterclaim WERNER GRAF STROM, have judgment against defendants dismissing the said counterclaim, and it is further,

ORDERED: That the complaint as to FENESTRA FABRICS INC., be and it is hereby dismissed.

Dated: New York, N.Y.
November 21st, 1974

Raymond F. Burghardt
Clerk

APPROVED:

Charles H. Tenney
U.S.D.J.

At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the day of in the year of our Lord, One Thousand Nine Hundred and Seventy

PRESENT: HONORABLE: CHARLES H. TENNEY
United States District Judge.

CARLYLE HIGHSMAN, TRUSTEE OF T,XTURA, LTD. IN BANKRUPTCY PROCEEDINGS FAMESTRA FABRICS INC AND MALCOLM G. POWRIE VS# CLARK-SCHWEBEL FIBER GLASS CORP. BURLINGTON INDUSTRIES INC AND J.P. STEVENS AND CO INC-SAND-VORNET GRAFSTROM

66 Civ 4230
Docket No.

and deft on the counterclaim
Regan Goldfarb Powell & Quinnby: Howard Breindel,

Now comes the Plaintiff by
Wells Burgess, Jan Atlas, Robert Aronson(

(Clark-Schwebel Fiber)

and moves the trial of this cause. Likewise comes the Defendant by
White & Case by Thomas McCanney & J. Michael Brown- (J.P. Stevens & Co)Paul Wei Rifkind Wharton & Garrison by: Jay H. Topkis, Selvyn Seidel & David Fine.(--- Burlington Ind. Inc. (Bergson Borkland Margolis & Adlerby:Donald Hardison &Stev

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial. Tratt

10-15-74 Trial begun

10-16-74 Trial continued. OCT 1974 Trial Continued - OCT 18 1974
Trial Continued - OCT 1974 Trial Continued - OCT 2 1974
Trial Continued - Trial Continued OCT 24 1974
Trial Continued - OCT 25 1974 - Trial Continued - OCT 28 1974
Trial Continued OCT 31 1974 - Trial Continued OCT 31 1974
Trial Continued - NOV 1 1974 Trial Continued. NOV 6 1974
Trial Contd. NOV 7 1974 Trial Contd. NOV 1974 Trial Continued
11-12-74 - Trial Continued - 11-13-74 - Trial Continued
11-14-74 Trial Continued - 11-15-74 - Trial Continued -
11-18-74 Trial Continued - Case Concluded.

— Over —

(AN EXTRACT OF THE MINUTES)

At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the day of in the year of our Lord, One Thousand Nine Hundred and Seventy

PRESENT: HONORABLE: Charles H. Tenney *United States District Judge.*

Carlyle Michaelson, et al

vs

Clark-Schwebel Fiber Glass Corp, et al

Docket No. 66 Civ 4230

Now comes the Plaintiff By

and moves the trial of this cause. Likewise comes the Defendant by

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial.

Defendants move to dismiss the issue of price fixing in the decorative fiber glas fabric industry and to dismiss plaintiff Textura. Motion Granted. The attached interrogatories having been submitted to the Jury, and the jury having answered the interrogs as indicated thereon, and the jury having found in favor of the Plaintiffs "Textura Ltd & Malcolm Powrie", on the issue of conspiring to drive plaintiffs out of business, only as to defendants Burlington and Clark-Schwebel, and the jury having further found that plaintiff textura sustained damages in th sum of $ 531,617.00 (Trebled), and the jury having further found that plaintiff Malcolm Powrie had not sustained any money damages, and on the issue of conspir to fix prices of industrial fiber glass fabric, the jury having further found on the dates indicated that defendants J.P.Stevens & Burlington had fixed prices of industrial fiber glass fabrics and awarded damages against J.P. Stevens to Textu on behalf of Class Fabric for the amount of $ 22.40 (trebled) and awarded dama to Textura against Burlington Ind. for the amount of $77.16(trebled), and havi further found that plaintiff or vendees Grafstrom, defendant on the counterclai had not made a false representation of any material fact to any defendant which

(AN EXTRACT OF THE MINUTES) -over-

At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Court House, in the Borough of Manhattan, City of New York on the day of in the year of our Lord, One Thousand Nine Hundred and Seventy

PRESENT: HONORABLE: Charles H. Tenney
United States District Judge.

Carlyle Michaelson, et al
vs
Clark-Schewbel Fiber Glass Corp, et al

Docket No. 66 Civ 4230

Now comes the Plaintiff By

and moves the trial of this cause. Likewise comes the Defendant by

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial.

relied upon by the defendant, and the defts have reserved their right to move pursuant to Rule 50, Federal Rules of Civil Procedure, it is Ordered, Adjudged and Decreed, that plaintiff Textura have judgment against the defendants Burlington Industries Inc. and Clark-Schewbel Fiber Glass Corp, in the amount of $531,617 (Trebled- and it is further ordered that plaintiff Textura have Judgment against the defendant J.F. Stevens in the amount of $22.40 (Trebled, and that plaintiff Textura have Judgment against Burlington in the sum of 77.16 (Trebled, and it is further ordered that plaintiff & defendant Vernes Grafstrom have judgment dismissing the counterclaim.

Roy B. Dawson.

A. CONSPIRING TO DRIVE PLAINTIFFS OUT OF BUSINESS.

1. Was there a conspiracy between (two or more persons) or corporations to drive Textura out of business by any or all of the following means:

- by withdrawing, restricting or reducing the credit terms previously extended to Textura

- by lowering the quality of the merchandise that (any defendant) or defendants had previously sold to Textura

- by ceasing to deliver any fabric

- by refusing to weave any fabric

- by refusing to sell any fabric

- by modifying any arrangement under which the goods woven for Textura were held and not invoiced until called for delivery

- by coercing or forcing Textura to enter into a settlement agreement in connection with disputes it had with Clark-Schwebel, or

- by modifying policy regarding the adjustment of quality claims

YES ✓ NO _____

If your answer is NO, omit questions 2 through 6 of this Part and go to Part B.

2. If your answer to question 1 is YES, which of the defendants was involved in the conspiracy? Answer yes or no for each defendant.

Burlington YES

Clark-Schwebel YES

J. P. Stevens NO

B. CONSPIRING TO FIX PRICES ON INDUSTRIAL FIBERGLASS FABRICS.

1. It has been stipulated that between 1956 and late 1962 the defendants fixed prices on first-grade ("firsts") industrial fiber glass fabrics. On June 27, 1960, Glass Fabrics purchased $448.06 worth of industrial fabric "firsts" from J. P. Stevens, and on July 15, 1965 and August 25, 1965, Textura purchased a total of $1,543.27 worth of industrial fabric "firsts" from Burlington.

Had the prices of these particular industrial fabrics been fixed? Answer yes or no for each of the following:

(a) Industrial fabric purchased by Glass Fabrics from J. P. Stevens on June 27, 1960 YES

(b) Industrial fabric purchased by Textura from Burlington on July 15, 1965 and August 25, 1965 YES

If your answer to (a) and (b) above is NO, omit question 2 of this Part and go to Part C.

2. If your answer to either (a) or (b) of question 1 of this Part is YES, what damages were sustained as a result of the price-fixing on the particular fabric purchased? Give a dollar amount or "none" for each of the following:

(a) Damages sustained by Glass Fabrics on purchase of industrial fabric from J. P. Stevens on June 27, 1960 $ 22.40

(b) Damages sustained by Textura on purchase of industrial fabric from Burlington on July 15, 1965 and August 25, 1965 $ 77.16

3. Was the conspiracy a proximate cause for Textura going out of business?

YES ✓ NO _____

4. If your answer to question 1 is YES and your answer to question 3 is YES, what damages, if any, did Textura sustain as a result of the conspiracy? Give a dollar amount or "none".

$ [illegible]

5. If your answer to question 1 is YES, did plaintiff Powrie sustain any damages as a result of the conspiracy which he could not have avoided by using reasonable efforts?

YES _____ NO ✓

6. If your answer to question 5 is YES, what unavoidable damages, if any, did Powrie sustain? Give a dollar amount or "none".

$ NA

C. COUNTERCLAIMS.

1. Has any plaintiff or Grafstrom intentionally made a false representation of any material fact to any defendant which was relied upon by that defendant?

YES_____ NO ✓

If the answer is YES, to whom was it made?

_____

_____

_____

2. If the answer to question 1 is YES, what was the false representation?

_____

_____

_____

_____

3. As to each defendant to whom the false representation was made, what is that defendant's damages? Give a dollar amount or "none".

Burlington $_____

Clark-Schwebel $_____

J. P. Stevens $_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, FENESTRA FABRICS, INC. and MALCOLM G. POWRIE,

Plaintiffs,

-against-

CLARK-SCHWEBEL FIBER GLASS CORPORATION, BURLINGTON INDUSTRIES, INC. and J. P. STEVENS & COMPANY, INC.,

Defendants.

66 Civ. 4230 (CHT)

MEMORANDUM

TENNEY, J.

Following the conclusion of a lengthy trial, in which a jury returned a verdict for plaintiff, Carlyle Michelman, Trustee in Bankruptcy of Textura, Ltd. ("Textura"), in the sum of $531,617.00 against Clark-Schwebel Fiber Glass Corporation ("Clark-Schwebel") and Burlington Industries, Inc. ("Burlington") and a nominal verdict against J. P. Stevens & Company, Inc. ("Stevens"), defendants Clark-Schwebel and Burlington have moved for relief from that judgment. In addition, an unsuccessful plaintiff, Malcolm G. Powrie, has moved for a new trial. Finally, plaintiff Michelman has moved for an award of counsel fees. These motions will be discussed seriatim.

Motions by defendants Clark-Schwebel and Burlington: (1) renewed motion for a directed verdict under Rule 50(a); (2) motion for judgment N.O.V. under Rule 50(b); and (3) motion for a new trial under Rule 59

The grounds for the motions are: (1) that plaintiff Michelman failed to present sufficient evidence from which the jury could have found in his (Textura's) favor and that, accordingly, judgment in favor of the defendants notwithstanding the verdict ("N.O.V.") should be granted; (2) that the verdict is against the weight of the evidence; and (3) that there were errors in the charge and in the conduct of the trial, for which a new trial is requested.

Plaintiff has clearly demonstrated in his brief in opposition to the motions that there was sufficient evidence to support the jury's finding of a conspiracy and the Court is in complete agreement with that conclusion. There was sufficient evidence from which the jury could have reasonably found that Burlington and Clark-Schwebel took similar actions to restrict the credit terms on which they previously sold fiber glass fabrics to Textura and to restrict the availability of marketable fiber glass fabrics to it, all at a time when these defendants were in constant communication with each other, and that they knew that their joint actions would drive Textura out of business.

Defendants rely heavily upon the contention that plain-

tiff's proof fails to meet the criteria necessary for the doctrine of conscious parallelism to apply here. Again, it should be noted that plaintiff has met those criteria by establishing evidence of similar or parallel conduct--not identical and contemporaneous conduct, which are the criteria urged by defendants. Plaintiff has shown restrictions of Textura's credit, cessation of deliveries, refusals to process orders, demands for personal guarantees, all of which were effected in apparent contradiction to defendants' self-interest and all of which could have been deemed rational only if the other parties to the conspiracy had agreed to act in a similar manner. Variations as to the time actions were taken and methods used to accomplish the purpose of the conspiracy are of little aid to defendants, particularly since plaintiff need not rely on the doctrine of conscious parallelism alone; plaintiff proffered evidence of motive, constant contact and communication between defendants at the time of their similar, if not identical, restrictive conduct, as well as admissions and threats. Likewise, there was sufficient evidence from which the jury could have reasonably found that defendants' conspiracy was the proximate cause of Textura's damage and to support the jury's award.

Defendants' charge of error in the Court's instructions to the jury regarding "conscious parallelism" and "exchange of information" suffers from the same defects as does their argument as to the insufficiency of the evidence of a conspiracy. On the

basis of the instructions given to the jury and the form of the verdict submitted to it, the Court cannot conceive how the jury could have been misled as to the requisite elements of proof of a conspiracy under applicable anti-trust law. Defendants' claim that instructions requested by them were erroneously not given by the Court presupposes that the requests were legally supportable, which they were not.

With one exception, the remaining charges made by defendants in connection with the conduct of the trial do not merit serious discussion. However, the Court believes it should respond to the charge that it unexpectedly limited the summation of defendants Burlington and Clark-Schwebel. This charge is an egregious distortion of the facts. In the first place, it had been agreed by the Court and all counsel that Jay H. Topkis, Esq., appearing on behalf of Stevens, would wield the "laboring oar" throughout the trial on behalf of all three defendants. One has only to examine the transcript to see that this procedure was followed.

On November 6, 1974 plaintiffs rested and defendants advised the Court that their case would be "quite brief" and "at the outside, two days" (Transcript [Tr.] 1942). The balance of the day was devoted to argument of a motion to dismiss the complaint, conducted by Mr. Topkis "on behalf of all three defendants." Neither Burlington's nor Clark-Schwebel's counsel requested that he be heard, although the Court inquired whether anybody else had anything to add (Tr. 1991).

On the following morning, November 7, the Court asked how long summations would be since--in view of the fact that defendants had then indicated that they intended to call only one witness and introduce some documentary evidence--the Court assumed that the summations could be concluded on that day (Tr. 2004). Wells D. Burgess, Esq., counsel for both plaintiffs, indicated that he hoped plaintiffs' summation could be concluded in one hour. No estimate was given by defendants as to the time they would require. During the luncheon recess, due to a personal emergency, the Court was obliged to leave, but requested the Chief Judge to adjourn the case until the following morning. Since defendants wished to conclude with their sole witness, the Chief Judge presided over the trial during the afternoon of November 7 in accordance with the stipulation of the parties (Tr. 2068-69). At the conclusion of that witness' testimony, the jury was excused until November 11. The Chief Judge indicated that summations and instructions should be completed in one day. Again, Mr. Burgess indicated that he would need one hour. When the Chief Judge inquired whether anybody objected to one hour, Mr. Topkis replied "That's fine for us, your honor." (Tr. 2139-40).

On November 11, the Court having returned, defendants offered additional evidence and then rested (Tr. 2147-55). Thereafter, in the robing room, the Court ruled on the various requests to charge and indicated its hope that summations could

be completed and the jury instructed on that date (Tr. 2156). Mr. Topkis commenced his summation "on behalf of all three of the defendants, and with particular reference to the only one that I represent, namely, J. P. Stevens ...." (Tr. 2168). Mr. Topkis was still summing up when the luncheon recess was called, at which time he requested another 25 minutes even though he had already exceeded the one hour allotted. When the Court inquired whether the other defendants were going to sum up too, Donald L. Hardison, Esq., counsel for Burlington, replied "Briefly". (Tr. 2207). Thomas McGanney, Esq., counsel for Clark-Schwebel, did not respond.

Mr. Topkis continued his summation after the luncheon recess. Then, Mr. McGanney commenced his summation, although at the luncheon recess, he had not indicated any intention to sum up at all. His opening remark to the jury is interesting: "I am not going to repeat what Mr. Topkis has said but I do want to say a few things specifically about my client, Clark-Schwebel." (Tr. 2229). After he had spoken for about ten minutes, the Court advised Mr. McGanney that it would give him "about two minutes more." (Tr. 2235). In response, Mr. McGanney said that he "would like to say one thing, just about the quality disputes, as Mr. Topkis suggested I might mention it." He then proceeded to do so and made no request for additional time.

Mr. Hardison, the last of the three defense counsel to speak to the jury, then summed up on behalf of Burlington, open-

ing with the gratuitous statement that the "pressure is on me to be brief." (Tr. 2237). At no time did the Court attempt to limit the length of his argument.

After a short recess, Mr. Burgess commenced his summation, noting, "We have heard at great length from defendants in this action, some two hours and ten minutes' worth." (Tr. 2250) (Emphasis added). Plaintiffs' summation, according to defendants, consumed approximately the same time. On one occasion, plaintiffs' counsel was advised by the Court that he had already consumed over one hour and a half, and he indicated he would attempt "to wrap this up very quickly." When he had concluded, the Court asked defendants' counsel whether they had "any brief rebuttal" and Mr. Topkis replied "Under five minutes. I will make it three." Neither of the other defense counsel responded. (Tr. 2322-23). After Mr. Topkis had completed his rebuttal, the jury was excused as it was then too late for the Court to give its charge as it had originally intended. Thereafter, in the robing room, no claim was ever made that the Court had improperly limited summation by any party. The simple fact is that defense counsel had grossly exceeded the time allotted--a fact which both Mr. McGanney and Mr. Hardison were aware of when they rose to speak.

For the above-stated reasons, defendants' motions are denied.

Plaintiff Powrie's motion for
a new trial pursuant to Rule 59

Plaintiff Powrie contends, although his counsel did not request such a charge and only raised an objection after the charge had been completed, that the Court erred in failing to instruct the jury that the burden of proof was on defendants to show Powrie's failure to mitigate in connection with his claim for damages resulting from lost salary. Powrie speculates that the jury may have found, by less than a preponderance of the evidence, that, although Powrie suffered damages, he failed to mitigate properly. Such speculation ignores the fact that the only evidence on mitigation showed that Powrie did in fact mitigate (thereby suffering no damage). There was no evidence as to failure to mitigate and the jury could not possibly have been misled by the instruction, at another point in the charge, with respect to the meaning of the term "preponderance of the evidence." Plaintiff Powrie's motion for a new trial is denied.

Plaintiff's Motion for an
Award of Attorneys' Fees

Plaintiff Michelman, on behalf of Textura, has moved for an order awarding him a reasonable attorneys' fee as provided in Section 4 of the Clayton Act, 15 U.S.C. § 15. Defendants Clark-Schwebel and Burlington have requested an evidentiary hearing. Defendants contend that plaintiff's attorneys did not break down their time and charges to defendants' satisfaction and did not

substantiate the hours allegedly devoted to this case.

Accordingly, the Court will hold an evidentiary hearing in connection with the application for fees. Defendants, upon reasonable notice, shall be afforded ample opportunity and time to review the time records of plaintiff's attorneys. Plaintiff may apply to the Court, on a proper showing, for leave to pursue such limited discovery of defendants and their counsel as the law permits.

The parties shall advise the Court when all such discovery has been completed, but in no event shall the period of discovery exceed thirty (30) days from the date hereof. The Court will then fix a date for the evidentiary hearing.

It is so ordered.

Dated: New York, New York
May 2, 1975

CHARLES H. TENNEY

U.S.D.J.

tiff Textura, by carrying out in consort, by conspiring against Textura, and by carrying out in concert actions which they had determined together, disciplinary actions, were able to and did within only a few months destroy the entire business of that company, the plaintiff Textura.

This was done in the year 1966, at a time of plaintiff Textura's greatest expansion of sales and financial success in its entire corporate history.

This is also the story of blatant price-fixing by the three weavers and the elimination of competition among them by secret meetings and other machinations to camouflage and cover up the price-fixing and communications.

This price-fixing resulted in higher prices for Textura and higher prices for their customers than would have obtained through lawful free competition, all to the detriment of the customers of the weavers, including the plaintiff Textura and the public in general.

You will hear the testimony of Mr. Jack Schwebel, the president of Clark-Schwebel and a hostile witness and the ringleader of this price-fixing conspiracy, testimony in which he admits openly the three

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lose the support of Burlington and Stevens, and they got that support.

Mr. Nordheim began communicting with the other two defendants, Mr. Nordheim of Clark-Schwebel, saying, "Let's play this account slowly."

And what happened? The other defendants, Burlington and Stevens, began tightening the screws, began shutting down the credit of Textura.

In March of 1966 Clark-Schwebel stopped all shipments to Textura and made it impossible for Textura to fulfill its delivery and installation obligations to its customers. They billed Textura for $80,000 in undelivered goods; they brought an arbitration action against Textura, claiming $92,000.

This invoicing, as I have said, was in direct contravention of the agreement of the parties.

Now, at this point, as I have said, Mr. Nordheim and Clark-Schweibel, of price fixing fame, were communicating with the other defendants, Stevens and Burlington, and with Dommerich and its president, Mr. Moskowitz, advising them, "It would be unwise for you to continue these extended credit arrangemnts and suggest that you not allow Textura to place orders with you," because, you see, Clark-Schwebel was not accepting any more orders, they cut him off, put

up your sales best you can. You run the shop informally. You get things done. You try to turn a profit. You try to put out the best picture of the businessyou can.

Thsi will never amount to the kind of fraud and misrepresentation the defendants are claiming in this case. It just doesn't add up to it. The fact of the matter is they really have nothing substantial to support their claim. We are going to ask you, on all the evidence, to determine that Mr. Powrie and Mr. Grafstrom have absolutely no liability on the counterclaim in this action.

With that I would like to conclude.

Thank you very much, ladies and gentlemen.

THE COURT: We will recess to 2 o'clock.

(Luncheon recess.)

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AFTERNOON SESSION

(2.00 p.m.)

(Jury in box.)

THE COURT: You may proceed.

MR. TOPKIS: If your Honor please, Mr. Foreman, ladies and gentlemen of the jury:

We have already been introduced. My name is Jay Topkis. My firm is Paul, Weiss, and we represent here, Mr. Seidel, Mr. Fine and myself, the defendant J. P. Stevens, which is one of the three defendants in this that you are going to be called upon to decide.

Stevens is an old company, a company that has been in business since before the Civil War; it is a textile company; it is a very large textile company, and in 1954, as I recall, it decided to go into the glass fiber fabric business. It did so by acquiring a little, tiny company called J. P. Schwebel & Company, Inc.

What happened was that after World War II our scientists learned how to do a most extraordinary thing, to take glass, molten glass and by extruding it through pressing through a form, to wind up with tiny fibers, thinner than any other fiber known to man, thinner than a hair, thinner than Dacron, thinner than polyester.

As a matter of fact, it was so thin that the

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the same degree of skeptical attention.

Now, as I say, Mr. Powrie in 1964 invested in this company called Textura, which had been founded in 1962. In 1964 Textura went into the curtain business, drapery business, late in 1964, and in 1966 Textura went bankrupt.

Just as Textura went bankrupt, Mr. Powrie filed this lawsuit, claiming that Textura had been put out of business by acts of the various defendants.

It is important to realize that what we are dealing with here is an accusation of collective, joint, common acti.. I stand before you representing J. P. Stevens. I don't represent Burlington and I don't represent Clark-Schwebel; they have their separate lawyers and they will address you from time to time.

It has been agreed among us, I think by virtue or attributable to my gray hairs, that I will lead. But that is the extent of our common action in this courtroom. And the issue in this trial, one of the issues in this trial is whatever may have happened to Textura, Powrie, did it happen as a result of co.on action, unity, agreement, coordination, conspiracy by the three defendants? Or did it result from either misfortune, mismanagement on the part of Mr. Powrie and his colleagues, their overreaching, taking

And that's just what happened here. These three companies -- and for all I know other companies -- were talking among themselves about Powrie, this guy who never paid his bills. And I want to say that he was to a degree consistent. Just as he didn't pay us, so he didn't pay the telephone company, he didn't pay the government, and he didn't pay his factor, and he didn't pay, and he didn't pay, and he didn't pay. I don't know who he did pay, but he was very, very good at not paying.

There was a suggestion here that there was something improper in Clark-Schwebel's controversy with Mr. Powrie. Well, I don't understand that. The simple of it is that Mr. Powrie ran up a big bill with Clark-Schwebel, he didn't pay them, and he didn't pay them and he didn't pay them, and when they asked him for the money he suddenly realizes that some of the merchandise they have shipped him has quality defects.

He hadn't said anything about it until they started pressing him for money, but all of a sudden he got very upset about the quality. And he advised Clark Schwebel that he was going to -- that he had this claim about quality. So Clark-Schwebel sends a man out to talk with him and look at the fabric, and the man

rate of $10,000 every two weeks. And then he wrote Clark-Schwebel and said, "Gee, I am terribly sorry, I can't do it. That's too hard a schedule. I want to pay less."

They said, "What can you pay?"

He made a proposal and they accepted. A couple of weeks later he still hasn't paid dime one, but a couple of weeks later he writes again, "I am terribly sorry, I can't make even the modified schedule, can we have another modification?"

They say, "Yup, sure, we will agree to the modification; just pay, for heaven's sakes."

Well, ultimately, as I say, he had promised to pay $70,000 plus interest. Of the whole business, what he paid was 5000 big dollars.

You have seen, we have all seen, I am sure, professional deadbeats. I don't like to use such harsh terms. But there is no sense in calling them otherwise than as they are.

Now, there is a suggestion here in Mr. Burgess' opening that we agreed to put Textura out of business. I say, "Prove it." Nobody had any reason to put him out of business. Nobody agreed to put him out of business. He wasn't put out of business; he failed, he

went out of business. The reasons had to do with his own failures, his own misfortunes.

The suggestion that this all came about because of some plot, some plan, some conspiracy on the part of the defendants is, I suggest to you, total fantasy.

You know, if you find that the telephone company cuts off a man's service, and if you find that Con Edison cuts off his service, and if you find that his life insurance is cancelled, and if you find that the butcher refuses to deliver any more meat, you can perhaps conclude that this was because of a plot, a plan, a conspiracy, on the part of the telephone company, Con Ed, the butcher, the life insurance company, and so on. Or you may conclude -- and this I think is a little more reasonable -- that it was because he didn't pay anybody. And that's the kind of person we are dealing with here.

These defendants gave this man, gave his company, all the leeway in the world, and he, in blunt terms, fleeced them, he lied to them, and ultimately, through his own fault he went out of business.

And then, as a final irony what does he do? He sues in this court the three companies that kept him in business, that had started him in business by advancing

him the money that he needed to go into business. This is the -- I don't know, there are all kinds of biblical stories about the ungrateful child, but that's what this man was.

Now, it is interesting that he didn't sue the phone company and he didn't sue the government for collecting taxes, but he sued us.

There is a suggestion from Mr. Burgess that the defendants agreed to fix prices. That is true. And let's have no misunderstanding about it. The evidence is quite clear that in 1956, in this infant fiber glass industry the companies that were going into the business had some very rocky times and the individuals who were running them decided that the only way they could survive was to agree as to the prices at which they would sell some of their merchandise.

I say "some" very, very loudly, because what they agreed on was an agreement to fix the prices at which they would sell industrial glass fabric, not decoratibe fabric. I think there is no question whatsoever about that.

There will be testimony and exhibits offered to you making it clear that that agreement, that price-fixing agreement -- and it was unlawful, it was clearly

unlawful -- that agreement was made in 1956, and ended in 1963, a year and a half or almost two years before the end of 1964 Textura went into the curtain and drapery business, the decorative business.

There will be not the first word of proof offered to you ladies and gentlemen that anybody ever fixed prices on decorative fabrics. They fixed prices on industrial. To our defendants' shame let it be said that they did. But that they fixed prices on decorative, not for a second. Those matters are all behind us. They were resolved in this courtroom and other courtrooms of this building many, many, many years ago. They had nothing to do with Mr. Powrie, with Textura.

I said to you before that Mr. Powrie started out in Textura with a $25,000 investment. I didn't hear in Mr. Burgess' opening statement any figure as to how much in damages he was going to ask for this poor victim. It will be very interesting to hear the figure he comes up with. If it is less than millions I'll be surprised. A short course on how to run $25,000 into millions by putting your company into bankruptcy and then bringing a lawsuit.

You are going to hear Mr. Powrie testify before you. He is going to be their first witness and he

that is the story I was going to tell you about our problems with Mr. Powrie. I think basically I want to make two points:

One is that Mr. Clark and Mr. Schwebel went into the fiber glass business; they were experienced in producing industrial fiber glass fabrics, and that is what they devoted themselves to. And that is what this price fixing agreement plaintiffs would make so much about was concerned with. Mr. Schwebel will come before you and he will tell you about that. He will also tell you that it had nothing to do with drapery fabrics.

Soon after they started business, Mr. Schwebel hired a man named Ray Nordheim to run the decorative fabric division of Clark-Schwebel. Mr. Nordheim will also come before you. He is no longer an employee of Clark-Schwebel, but we have subpoenaed him to come and testify, and he will testify. He is the man that dealt with Powrie day in and day out. He negotiated the contracts. They designed the fabrics together. They negotiated the price. They determined the delivery schedules on the contracts. Mr. Nordheim dunned Mr. Powrie for payment, and we will bring Mr. Nordheim here to testify to that relationship. Mr. Topkis has sketched it out.

It has been suggested, I think, that my client,

Q When you came to Southern California did there come a time when you entered the fiber glass business?

A Yes. I left because I wanted to live in Southern California. I left two businesses behind in the City of Milwaukee, and when I arrived in Southern California I took an office on Spring Street and became what is called a "looker," that is, people looking for a business to go into. And the word on the street, which is our financial street in Los Angeles, was that fiber glass and electronics were the coming businesses.

I didn't feel qualified because I was not an engineer to into the electronics business, but I did pursue an interest in the fiber glass business and eventually I purchased one-half interest in a fiber glass finish plant plant called Minardi & Company, located in Escondido, California.

Q Tell the jury something about your duties and responsibilities with Minardi & Company?

A Minardi & Company was a small company. It was a father and son-in-law that ran Minardi & Company before I came with them.

The duties were not strictly defined because of our size. However, we all had the notion that fiber glass was a coming product and that somehow if we used our imagina-

tion and skills, we could make a company out of Minardi & Company.

They had one proprietary item called a high temperature filtration sock, that is, a long sausage-like shaped fabric tapered item made out of fiber glass, in our case, just suspended in a house called a bag house. These bags are suspended from machinery near the ceiling that shakes them, and the purpose of the bag house is to strain hot affluents and particles out of the glass that would be expended in the air by a plant, like a zinc plant or a lead plant, and the interest at that time in Southern California was to clean up the air.

Smog was becoming a problem. So these bag houses were attached to the exhaust of a foundry-type company, and these particles were strained through these bags that we made, and Minardi & Company made these bags and refined them, and we were the first people to use fiber glass for such a purpose.

Later we found a place for our filtration socks in the cement industry and in the carbon black industry, and when we did that our company became quite sizable.

Q Who were your sources at that time at Minardi?

A Of fabric?

Q Of fabric.

A We purchased at that time from United Merchants, from J. P. Stevens, and from Hess-Goldsmith, which is the fiber glass division of Burlington.

Q Did there come a time when you assumed for yourself additional responsibilities in Minardi & Company?

A Well, we didn't know that much about that side of the field, but we elected, Mr. Ballard and I elected to get into the side of fiber glass we were not in, which was the drapery side.

We purchased seven weaves, and two sources were Hess-Goldsmith, Burlington's arm, and J. P. Stevens, and with out finishing machinery, which was the uniqueness about the Minardi Company, we finished these fabrics and put colors on them and attempted to distribute them in the way we had heard it was done, which was through jobbers, and those jobbers maintained showrooms and services to sell to decorators, and we made them in '56 and '55, back in there.

Caro-Upright in Los Angeles, and Dazian & Fabco, these three people were people we sold our finished products to in bolt goods form.

Q Mr. Powrie, I would like for you to explain to the jury at this time just how the business of fabricating glass fabrics in drapery takes place as you understand it

from the very beginning in the industry?

A How fiber glass fabric ultimately winds up as a drapery?

Q Yes, from the very beginning?

A Well, one of the interesting things about getting into fiber glass was the fascinating background of how to make it, and I did visit with the Owens-Corning people and got well acquainted with them, and I saw their process, which wasto take small glass marble, about one inch round, put it in a litle crystal, and as it melted and dripped out, they drew those fibers. They called it drawing fibers.

Those little fibers, as has been explained, were very, very, very fine; they are one ten-thousandths the size of a human hair, and I guess that varies a little bit, but as they draw them they spray them basically with organic starch, and the purpose of that is that you are dealing with little glass rods, just like the rod that you would hang a towel on, except it is in diminutive form. These rods are sprayed with organic starch to pillow them so they can be woven and not break in the operation of weaving, so they won't bend the glass, but they simulate bending, because they have a pillow on them. These fibers are sold to weavers, who may process them for different

purposes. But they weave them into fabric, and at that level we came in. We were called the converter. We went to these mills --

Q You speak of these mills. Identify them for the jury, please.

A Hess-Goldsmith and J. P. Stevens, and in the early stages United Merchants, and ordered whatever styles we wanted, as a converter initially for the first few years. We then processed and put our colors in and took the big risk. You had to buy in volume from a mill and sell them to jobbers, who were on another level, who sold even smaller amounts to decorators, who sold them to the housewves, and that was the progression of the woven goods to the ultimate user.

We followed that process for several years and found that fiber glass as a decorative item was almost unacceptable to the decorator people. It had attributes about it that we recognized as commercial and mechanical, but the decorator people didn;t really care. I knew nothing about the decorator side of things and I had no affinity for that side of things, no personal interest in it, but the decorators called the product slimy and it didn't hang properly in uniform folds because it was glass, and only the little glass rods made it appear to bend.

We didn't do very well in trying to sell fiber glass through the normal channels and we found that a company trying to sell only one fabric which was an unusual fabric could not prosper.

Q Do you recall, Mr. Powrie, in fact what were the financial results of your operations for the first few years that you were in business?

A Well, the first couple of years we were just getting organized. I would think up until 1958 we were at a break-even position.

Q You are saying up until what time?

A 1958.

Q What company are we talking about now? Was there a company that Menardi organized in 1954?

A Yes, in 1954, I think it was April, Mr. Ballard and I formed Glass Fabrics, Inc. to sell the decorative goods.

Q Who is Mr. Ballard?

A Mr. Ballard was a principal in Menardi & Company. He was the son-in-law that I mentioned.

Q Did there come a time when, after this initial period, you decided to step up your involvement in Glass Fabrics, Inc.?

A In 1958 I sold my interest in Menardi & Company, and the question was what to do with this company we had formed called Glass Fabrics, Inc. It existed. We had an investment in it. And I took on the job of trying to make something out of Glass Fabrics, Inc.

At that time it had been experimental to a degree, to a high degree, and we found that we were not able to make a go of things by trying, as a single unusual fabrics source to make any money selling it down through the channels to the decorator. We couldn't get any enthusiasm from them. We held sales meetings, and that sort of thing, down through the years and nothing much happened.

Mr. Simone, Vincent Simone, handled the third jobber I spoke of, and he nad an unusual interest. He thought fiber glass was more of a product that belonged in industrial and commercial areas than in decorative areas, and we had become convinced as time went on that that was true.

He had a notion that it was a great cloth for hospital cubicle curtains. The hospitals' interest in a nonflammable fabric was paramount. They, of course, were required in many cities by fire marshals to put in as many inflammable products as they could, and when they found out they could substitute cottons and flammable products for fiber glass they found a great interest in our offerings.

So we -- Mr. Simone, in 1958, was already under way with a good business in the hospital cubicle

curtain business, and that I observed, and so when I moved into the company and took charge of it that was already going on, and we decided to expand that vigorously. We named a sales manager to handle only that side of the business, and we were pioneers in the field. I think we were probably the first people that ever sold hospital cubicle curtains in fiber glass.

This expanded rapidly. There was some federal government going into the expansion of hospitals, and we enjoyed the expansion of that business, along with the hospital business in general. That, of course, led us into selling hospitals other than cubicle cloth. They had this continued interest in fiber glass at their windows as a decorator item because of its fireproofness, and so we also had that.

But it was such a unique fabric that we wanted to exploit its capabilities which no other fabric had in areas that really were unknown.

Since we weren't getting any real cooperation from the normal channels of distribution, because they really had as many fabrics on the market, in their opinion, for decorator use, they didn't know what they really needed with fiber glass, and we couldn't really argue with that. We knew we had to get into other

fields.

We had also, I felt, to sell it in a different fashion. We began to look at these large installations that nobody was serving, such as a big army barracks, Vandenberg Air Force, I believe, where they were installing the missiles, was the first place that we did a job, and that was in 1958, and that was the kind of business that appealed to me, because we were buying in very large quantities, committing ourselves far in advance to the mills, and it just seemed to me to be good business to be able to sell large quantities, one color, one weave, to one installation, and so we had a little taste of that first way back in 1958 with Bandenberg Air Force Base.

This business gradually increased, and then we began to observe the building boom in high-rise office buildings, and there we ran into some problems in that building owners were not used to buying what went at their windows. That was still an individual tenant's problem. The owner was interested because it stimulated the interest in people to rent his space, because venetian blinds -- pardon me, such as this courtroom has -- are not as attractive as draperies, everybody agreed. So we, on that basis, were able

to interest building owners, but this problem of air conditioning became paramount and very expensive in the construction of a building.

Q Keep your voice up, please, Mr. Powrie.

A The costs of air conditioning wasvery high, and as we became acquainted with architects and engineers we learned that they didn't have a real solution to what was happening to their air conditioning problems when architects like Skidmore, Owings & Merrill were pushing the concepts of glass walls in buildings, and so many of the buildings you see in New York are the ones I am talking about where they appear to be all glass.

This admitted so much sun that their control over the sun was very, very difficult. They were able to refer -- I am talking about the engineers now -- were able to refer to some of the books and reference material they had. If they were qualified engineers they all belonged to a fraternity or a society called ASHRE, which is an abbreviation of American Society of Heating, Refrigerating and Ventilating Engineers. I think initially they had a V in it and then dropped the V and called themselves American Society of Heating and Refrigerating Engineers.

That society had laboratories, and they had produced definitive information about what venetian blinds would do at a window by way of sun control, and they had a formula that they used which we became familiar with, and the shading coefficient factor, as they call it, of venetian blids fit into this formula, and they could run the formula through and come up with a number of tons needed to cool a building.

At that time I recall that a ton of air conditioning cost a building owner about a thousand dollars, so if you had a large building, such as everybody sees here, that took 500 tons, it would be a very, very expensive th ing to be working with in the construction of a building.

We didn't have that information, so we were slowed down in our attempts to sell building owners and arc.'tects and engineers.

Through the cooperation of Owens-Corning initially we went to people like U. S. Testing Company and had them try to reconstruct the site of a building and reconstruct the sun through heat lamps and thermometers, and that sort of thing, and we got some information that at that time we didn't know but it was very primitive. However, we were able to use this in-

formation to talk from to architects and engineers, and our whole interest began to revolve around this type of selling.

The Owens-Corning people, who usually led the parade in whatever happened in fiber glass, took an interest in this and cooperated with us by influencing ASHRE, the engineers society, to undertake a study of how to establish that fiber glass draperies could be -- the shading coefficient factors could be developed on fiber glass draperies. They did that, and I remember it took two years.

I was impatient with the length of time it took, and I recall calling Cleveland on one occasion and talking to Mr. Osisik, who was the chemist in charge of this experiment, and he said the sun hadn't been out in Cleveland that winter, and they weren't able to test it.

We did ultimately get returns on this, and I can't tell you the year but I think about 1963 ASHRE furnished us the results of their experiments.

These experiments were good, proper and accurate, except that they didn't name our materials, and they could not because ASHRE did not want commercialization of their work.

So we could now take some more definitive

information to an eingeer, but we couldn't say, our sales people couldn't say, "This piece of fabric I am showing you is the fabric tested by your society's laboratories andso you can rely on the shading coefficient factors they are furnishing you and insert that in your formula and it will control the air conditioning tonnage in this building to the degree that the shading factor described."

To remedy that we employed, after some search, because this area was not a broad one and not well known to lots of people -- we employed John Yellott, who ran the Yellott Solar Laboratories in Phoenix, Arizona, to using ASHRE's basic work and instrumentation to develop shading factors for us and our fabrics, and we gave him that project I think in 1964, possibly the last couple of months in 1963.

He worked at all during 1964, and toward the end of 1964 -- well, during that time he sent us many brochures and the ASHRE people became interested in his work, and when he finalized us and gave us the final technical paper on it they made him chairman of their fenestration committee, as they called it, and I believe he still is. It was based on the work we were working with him.

That paper, again, we offered it to the ASHRE as just a scientific offering when they put it in their ASHRE Journal. Our people could now go to the ASHRE Journal, we could suggest they look at it, and they would find our work there with the credits given to us at the end of the paper. They mentioned our company's name and my name, and I think Mr. Alonzo's name, because we were most active with Mr. Yellott in developing this information.

To shorten that story, we finally had the data we needed. We could go to an engineer and say, "This piece of fabric, if it appeals to you, will perform in such-and-such a fashion, its shading factor is so-and-so, your laboratory agrees with us," and they would specify our material.

We put out a book called "The Engineer's Guide," which was finally published during the first few months of 1965, and it furnished the engineer the information that we had been talking about, so then we could hand him this material in one little package with samples, and we made an advertising piece out of it by showing samples of work we had done.

Q Is this the brochure you are referring to?

A Yes.

MR. BURGESS: I would like to offer this in evidence as Plaintiffs' Exhibit 1.

MR. TOPKIS: Objection. I don't think it has anything to do with this case. It may be a very interesting brochure.

THE COURT: I don't see its relevancy with the case, but I will receive it.

(Plaintiff's Exhibit 1 was received in evidence.)

Q Mr. Powrie, at the time you moved into the management of Glass Fabrics in 1958 what was the status of that company? What was the financial picture it was in?

A Well, it wasn't a good one. We owed --

THE COURT: Which company are talking about?

MR. BURGESS: Glass Fabrics.

A Between Hess-Goldsmith Division of Burlington and J. P. Stevens we owed $77,000 that was past due.

Q Did you take any action with respect to those debts?

MR. TOPKIS: Objection, your Honor. Really, that is back in 1958, 16 years ago.

THE COURT: I am admitting a certain amount of background, but I don't want the jury to get confused

ran, the manufacturing the operations side, which was one division of the company, while the credit department had the credit problems of all the divisions, that they had the option to make this decision themselves if they wanted to take the responsibility.

Q What was the decision that you were asking them to make?

A It was a credit decision, whether to give me further credit in the circumstances that I was talking about, which were past due bills that we owed them at that time.

I talked to Bob Kneisel of J. P. Stevens the same way, and he said, "Well, if Burlington is going to go along with you, I will. If they will not, I will not."

The upshot of the meeting the three days I was in New York was that they did agree to extend me credit on very particular arrangements. I told them that we wanted to go into the contracting business, that we were finishers of our own goods, which was the truth, we were the only finishers of fiber glass outside of themselves, that that would delay us in time of getting it to the place where we could sell it, that 3000 miles away would delay us, tnat we wanted to go into a side of the business that nobody had been in, which

was the construction business, and that those people did not pay on a 30-day basis, they paid when they got the money from the owner, so we had a time lag that no other converter had, so I needed three to four months to pay my bills, and they agreed to do that.

The second thing I needed was to place cc s with them that they would weave and store for me, they would store the results of the weaving, the goods and when I needed the goods I would let them know, I would call them out, and they would at that time ship them and bill me.

The three or four months I was talking about, time I needed, began at the time they billed me.

THE COURT: Are we talking now about Glass Fabrics?

THE WITNESS: Yes.

Q Do you recollect your practice with regard to the payment of bills for defendants Stevesn and Hess-Goldsmith therearter?

A We followed that practice. We paid their bills in three or four months.

Q How long did that practice extend?

A That practice extended from 1958 to 1966.

MR.TOPKIS: I believe Glass Fabrics

permit any conversations with Mr. Clark.

Q Do you recollect your practice with respect to paying bills with respect to Clark-Schwebel?

A Yes.

Q Did it follow a same general practice as obtained with Stevens and Hess?

A Precisely.

Q At this time I would like to show you Plaintiffs' Exhibit 52 for identification and ask you to identify that for the court.

A This is a letter to me from J. P. Stevens dated August 14, 1961, signed by John Binnie of their credit department.

Q Would you read that letter to the jury, please?

THE COURT: It hasn't been received in evidence yet.

MR. BURGESS: I am sorry. I would like to offer that letter in evidence.

MR. TOPKIS: Again, your Honor, this relates to dealings between Stevens and Glass Fabrics in 1961. I think we can go on almost indefinitely with this background.

THE COURT: We are not going to, but I am

and we elected to form a factoring company on the side that would purchase the invoices from Glass Fabrics.

Q Did you subsequently develop a relationship with another factor?

A Yes.

Q Could you tell the jury when that came about?

A Well, the factoring company that I formed with my associates was in '58 and that ran until '62, September of 1962, at which time the expansion of the company was evident to us and we wanted to put the money, that is, the parties in the factoring company, wanted to put the money more directly into our operation, and so we went to outside factors and we signed a contract with L. F. Dommerich & Company.

THE COURT: Are we talking about Glass Fabrics or Textura?

MR. BURGESS: Glass Fabrics.

Q Could you tell me how you came to be familiar, gained familiarity with L. F. Dommerich?

A Oh, I think it was recommended to me by our CPA, Mr. Bob Zimmerman, of Willheim, Berman & Zimmerman.

Q Could you tell the jury what a factor is?

A Well, a factor is a financial institution that usually serves certain groups of industry, and the textile

industry is a great user of factors.

A factor is a company that buys an asset of a company and they buy the most liquid asset, which is the invoices. If we made up a thousand-dollar invoice to one of our customers, we would offer it to L. F. Dommerich & Company and they would give us cash for it, and in our case it was a 90 per cent cash arrangement. They would return immediately 90 per cent cash and they would own the invoice and collect it.

MR. TOPKIS: If the witness has just purported to state the terms of the agreement between Glass Fabrics and Textura, I would submit that the agreement itself is the best evidence.

THE COURT: This is not between Glass Fabrics and Textura.

MR. TOPKIS: Between Glass Fabrics and Dommerich. I misspoke myself.

THE COURT: Do you have that contract?

MR. BURGESS: Yes.

Q Now, did there come a time when you undertook an expansion of program for Glass Fabrics?

A Yes.

Q Could you describe how that came about?

A Well, these developments, some of which I

scheduled, such as our interest in fiber glass, our discovering of a way to sell it, its uses, took a matter of years, and I think by '62, the beginning of '62 we knew we were on the right track. We were using this sales technique that I described to you shading factors; we were using the shading factor selling technique, and it was working, and in 1962 I think we did $800,000 worth of business, closer to 900, and in '63 we did a similar amount or somewhat more, and we made about $90,000. So we were sure we were on the right track.

The problems of expansion with what we had in mind, every penny we made we used for expansion, and by 1964 a number of things came into focus. Mr. Grafstrom and Mr. Porter --

MR. TOPKIS: I hate to object, but the question, as I understood it, did you form an expansion program for Glass Fabrics? We know that Glass Fabrics was liquidated at the end of '64.

MR. BURGESS: It is our contention that the formation of Textura and the acquisition of Glass Fabrics by Textura was part of the program of expansion of Mr. Powrie, and that is why we brought it up at this point.

THE COURT: The documents will speak for themselves. I assume we are going to get some contracts and

things like that in evidence, not just hearsay or talk about contracts.

Go ahead.

A A number of things came into focus about 1964. We had a plan in mind for the eventual participation of Mr. Grafstrom and Mr. Porter in the Company. We had developed our style of selling. We had formed a corporation called Fenestra Fabrics, Incorporated as a contracting arm that made the actual sales and installation in large institutions, and we had Yellott Laboratories under contract to develop shading factors for our own materials.

Furthermore, we had purchased all the stock of all the shareholders in Glass Fabrics, except a party by the name of Robert L. Johnston. However, in 1964 I had been talking to Johston and expressed the opinion to Grafstrom and Porter that we would soon have his stock. So we elected to expand at that time on a national basis and we formed a company on the side called Textura, Limited in 1962.

Q When you say "we"?

A Mr. Grafstrom, Mr. Porter and I.

Q What was your initial capital contribution in that company?

A We started with $25,000.

Q Did you subsequently make additional contributions?

A Yes, quite a number of them.

Q Did there come a time when Textura purchased the assets and liabilities of Glass Fabrics?

A Yes.

Q Could you tell how that came about?

A We formed Textura to have a company whose stockholdings would be according to our long range plan, that Mr. Grafstrom and Mr. Porter were to have 25 per cent each and I was to have 50 per cent. We had that company on the side and we had it in the business of another fabric.

THE COURT: From 1962?

THE WITNESS: Yes.

THE COURT: From '62 to '64 Textura was not in fiber glass products?

THE WITNESS: No.

THE COURT: Just in this other product?

THE WITNESS: Yes. This was a very small company that we operated under low draft to be the vehicle that we would ultimately take over the whole operation of Glass Fabrics, and we would then own the company as we planned and we were financially capable at that time to carry the company in an expansion program.

In the meantime, we did start the expansion

program through Glass Fabrics, knowing that that company would sustain a substantial loss because we opened offices in New York, Chicago, San Francisco, and we had representatives in most principal cities, in Mexci City and in Australia in two cities.

During 1964, I would say the second six months, we sustained heavy losses each month by design, because we were going to do this and we were going to have Textura pick up at the end of the year and would own the stock the way we wanted to and that is what happened.

At the end of '64 we had expanded. Glass Fabrics had assumed a $114,000 loss due to our expansion, and we had Textura buy all the assets and liabilities of Glass Fabrics and we dissolved Glass Fabrics.

Q What were the results of the operations of Glass Fabrics in '62 and '63?

MR. TOPKIS: I object on the ground that the audit of financials is the best evidence.

MR. BURGESS: We would offer those in evidence, your Honor, at this point.

THE WITNESS: Are you asking what the profits were?

MR. BURGESS: We offer in evidence the audited financial statements for Glass Fabrics from 1962 through

1964.

THE COURT: They are received in evidence. I assume they are relevant.

MR. McGANNEY: No objection.

(Plaintiffs' Exhibits 13, 15 and 20 were received in evidence.)

Q Could you take those statements, Mr. Powrie, and read for each year, identifying the statement by year, the gross sales and profit and loss for each year?

A The year ending 1962, our sales were $999,000 with a profit of $40,091.

1963, year-end, our sales were $1,180,687 with a profit of $49,285.

At the end of calendar year 1964 our sales were $1,001,693, with a loss of $113,788.

Q Now, Mr. Powrie, that statement for December 31, 1964, what companies does it comprise?

A It covers Glass Fabrics and Fenestra Fabrics, its wholly-owned subsidiary.

THE COURT: Was that true of the prior statements?

THE WITNESS: Yes.

THE COURT: They all cover Fenestra as well?

THE WITNESS: Well, Fenestra did not have its

own statement ever.

THE COURT: I want to know whether we are singling out '64.

THE WITNESS: Let me see if it says so. Actually, the '64 statement states it is Glass Fabrics and Fenestra, but these others do not. They say Glass Fabrics, Inc.

Q Did this expansion program that you had undertaken for Glass Fabrics continue after you started Textura?

A Yes.

Q Could you describe what activities you undertook in '65 to further that program?

A We had established all these offices and hired all these sales people. '65 was a year of trying to consolidate the expansion, and I hired a general manager, which I had never done before, for one year's time, because I was going to be in an in-travel status a good bit of the time, and during '65 we began to recoup our losses and polish up the organization. We had now three men in New York and two men in Chicago and offices in both cities and I think 33 salesmen by this time.

Q Now, what was the name of the man you hired as a general manager?

A Alan Friedman.

MR. BURGESS: I would like to offer Textura's statement, Plaintiffs' Exhibit 36, for December 31, 1965.

MR. TOPKIS: Your Honor, we don't object to it as being a purportedly audited financial. As to its truth and accuracy, that we seriously dispute.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 36 was received in evidence.)

Q Could you on Plaintiffs' Exhibit 36 read to the jury the gross sales and the profit and loss as it appears on that statement?

A Well, for the year-ended December 31, 1965, the gross sales are $1,412,986, and the loss before taxes is $31,195.

Q Now, Mr. Powrie, who prepared these statements, the statements that have just been offered in evidence?

A These are all year-end statements and prepared by the firm of Willheim, Berman & Zimmerman, with Robert Zimmerman being the partner.

Q When did they become your accountants or the accountant? Were they the accountants for Glass Fabrics?

A Yes.

Q When did they become the accountants for Glass

Fabrics?

A Their first work was to prepare the year-end statement for '58.

Q How did You come to obtain them?

A They were recommended to me by Larry Donley, who was the Los Angeles head of the credit division for Burlington Industries in the City of Los Angeles.

Q Were they also the accountants for Textura?

A They were accountants for all companies.

Q Did Mr. Zimmerman prepare all these statements?

A Yes.

Q Did you have any policy regarding or any discussions with Mr. Zimmerman regarding your relationship or his relationship with the defendants in this action?

A Well, I told Mr. Zimmerman that if Burlington, Stevens or Hess-Goldsmith, and later Dommerich, wanted any information, he was free to give it to them, any information in his hand.

Q Did that include the defendant Clark-Schwebel?

A Yes.

Q Mr. Powrie, in the process of asking you to sketch in the background of these two companies today, I just would like to get before the jury, ask you to tell me the years during which you did business with each of the

defendants in this action, for Glass Fabrics and Textura?

A We dealt with Hess-Goldsmith.

Q When you say "we," which company are you referring to?

A Glass Fabrics. This was formed in 1954, Glass Fabrics, and we dealt with them at the outset, that is, we dealt with J. P. Stevens and Burlington Industries, their Hess-Goldsmith division.

Q And how many years did you continue to deal with them?

A Right through 1966, which would make it what, 13 years.

Q Glass Fabrics dealt with Hess-Goldsmith and Stevens, you say, from 1954?

A From '54 to '64.

Q Did thereafter Textura deal with these two companies?

A Yes. I wrote letters to the defendants and told them from this point on that we had merged the companies, that their billings were to come to Textura after that.

Q Did Textura deal with Hess-Goldsmith and Stevens on the same terms and conditions that it had dealt with Glass Fabrics?

A Exactly.

Q Were the same personnel involved that had been involved in Glass Fabrics in effect in dealing with the defendant companies?

A Yes.

Q With Clark-Schwebel, when did Glass Fabrics begin doing business with that company?

A In '61.

Q How many years did it do business with Clark-Schwebel?

A Through 1966.

Q Now, Glass Fabrics -- through what year again?

A Oh, Glass Fabrics dealt with Clark-Schwebel from '61 to '64 and with Textura from '64 to '66.

am not sure but what we may have bought something from them, but they showed less interest as time went on, and Eric Weiss, their treasurer, who I became acquainted with, told me that they operated as a vertical company -- that is, they marketed their own weavings for the most part, or at least that was their principal business -- and with that I gradually drifted away from trying to go to them. They didn't seem to encourage sales to converters like myself.

Q So as we weaving sources then as of 1965 did you have any other available to you?

A There were no other sources.

MR. BURGESS: Your Honor, I think we have sketched the background for today.

THE COURT: Okay. Ten o'clock tomorrow morning.

(Adjourned to October 16, 1974, at 10:00 a.m.)

CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, October 16, 1974,

10:25 a.m.

Trial resumed.

- -

(Jury present.)

M A L C O L M G. P O W R I E resumed.

DIRECT EXAMINATION CONTINUED

BY MR. BURGESS:

Q Mr. Powrie, we have a number of matters to cover this morning. I ask that you keep your voice up and speak loudly and clearly and answer the questions I am to ask.

We were speaking yesterday about how you ordered fabrics from the defendants. How did you order fabrics?

Will you describe to the jury the process you ordered fabrics from the defendant J. P. Stevens?

A I would make a trip to New York and would either have something in mind that I wanted woven using an example of some existing fabric, and it didn't exactly have to be fiber glass.

Q When I am speaking of yc I was referring at the present time to Glass Fabrics, Inc.

MR. TOPKIS: To be even more precise could we know know year we are talking about? Was this 1956 or what?

THE COURT: I think you better concentrate on dates. They are quite important.

MR. BURGESS: All right.

Q Let us say in any of the years prior to the formation of Textura, while you were active as president and operating officer of Glass Fabrics.

MR. TOPKIS: That is confusing, too, because Textura was formed in 1962 and went into the decorating business in 1964. I don't think it is important, but let's pick one year and talk about that.

Q Then let's say 1958, Mr. Powrie.

A It doesn't matter. I ordered them the same way no matter what year it was. I would go to New York, in the case of J. P. Stevens, either knowing what I wanted or looking for something. This being the

center of the textile world, I was able to find fabrics, usually, that were close to the type that I wanted woven. I would also -- and I would take these with me to see Mr. Wilson, who was the head of the production of fiber glass for Stevens.

We would either use this piece of fabric and include fabric they had around the office in the form of samples and from that we would work up a fabric and I would order it, and we would, on other occasions, take an existing piece of fabric and make certain changes in it, like adding more picks to it, as they call it, when you filled in the fabric more in the horizontal, or more ends to it if you wanted to fill for fabrics in the vertical of it.

Q Now, Mr. Powrie, at this time did you place a contract with J. P. Stevens when you ordered the fabric from them?

A Yes. I would place maybe several contracts.

Q I would like to show you a document marked "J. P. Stevens & Company, Inc., sold to Glass Fabrics, Inc., 9348 Santa Monica Boulevard," and ask you to identify that document for the jury?

A This is not a contract. This is an invoice to me. This would follow a contract.

MR. HARDISON: May we have an exhibit number?

MR. BURGESS: There is no exhibit number. I drew it out of documents furnished by J. P. Stevens in their last designation.

Q Mr. Powrie, when you entered into a contract with J. P. Stevens did that contract have written terms on it?

A Yes.

Q And what were those terms?

MR. TOPKIS: Objection. Let's have the contract.

THE COURT: That's what I was going to ask you for. Please give me a contract.

MR. BURGESS: It is my error. Apparently what I brought down were invoices instead of contracts.

THE COURT: Let's go on to something else then.

Q When you were billed for the goods -- let me ask this. When J. P. Stevens manufactured the goods pursuant to the written contract, what did they do with it?

A They stored them for me until I called them out.

Q When you called them out, how did J. P. Stevens -- first of all, how did Glass Fabrics advise J. P. Stevens that they wanted a particular amount of these fabrics, or all of them?

A Well, we tried to use our purchase orders. We didn't always do that. We sometimes ordered them verbally and sometimes by a letter, but if there was any routine to it it was by the use of our purchase orders, most of it.

THE COURT: When these were stored, was any invoice issued, or was the invoice issued at the time you called themout of the warehouse?

THE WITNESS: The invoice to me was issued at the time I called them out and they were shipped.

THE COURT: So they could have been in the warehouse for a period of months before any invoice was sent out?

THE WITNESS: They were.

Q Now, Mr. Powrie, I would like to show you the document I just showed you and ask you to identify that for the jury.

A That is a J. P. Stevens invoice to us. That is a sale to Glass Fabrics in -- I am trying to find a date -- October 21, 1964, It's a style we call

different terms.

Q Who was present at this meeting?

A In the case of J. P. Stevens it was Robert Knisel. In the case of Hess-Goldsmith --

Q We're just talking about J. P. Stevens.

A Then it was Robert Knisel.

Q What did you say to him and what did he say to you at this meeting?

A Well, that was 1958, so I will have to give you the substance of it.

Q Please keep your voice up.

A The purpose in my meeting with Mr. Knisel was to see if I could work out an agreement that was different from these terms. We had been ordering under these terms and we were past due to J. P. Stevens, I would think, about half of the $77,000 I mentioned. To get more goods under those circumstances invoked a discussion of these terms and how to change them, and we arrived at an agreement, a verbal agreement whereby they would ignore the terms of the written documents and we would get up to four months extended terms, that is, four months from the date of the invoices, the billing invoices to us, not the date of the contract.

Q Mr. Powrie, at that time did you explain to Mr. Knisel the reasons why you needed this extra time?

A Yes.

Q What did you say to him?

A I told him of the differences between our company and its operation and his other customers, that is, I distinguished our problems in this regard from others.

First of all, we were on the other side of the United States. It took time to get a shipment to us, while that was not true when they delivered to people in this area. Further, we were unique in that we had our own finishing plant; they finished goods for all other converters; we were unique in that we were one who bought unfinished goods and there was time needed to bring them to Los Angeles and warehouse them and finish them.

Thirdly, we were entering into a new business which would delay payments from our customers to us, and, hopefully, we could pass that problem on or it would be shared with Stevens by Glass Fabrics. For those reasons we needed terms far beyond the net 30 that showed on [illegible] contracts, and we arrived at the verbal agreement that we could have up to three months time.

Q Now, in your discussions with Mr. Knisel did he mention the name of Burlington Industries or Hess-Goldsmith division of Burlington Industries at that time?

A He knew I was a customer of Hess, of Burlington

Q That was net cash, Mr. Powrie?

A That's what it says.

MR. BURGESS: I would like to offer that in evidence.

MR. HARDISON: No objection.

(Plaintiffs' Exhibit 805 was received in evidence.)

Q Mr. Powrie, I notice that the written contract between Glass Fabrics and Hess-Goldsmith, Division of Burlington, had terms of net 30 and the invoice referred to terms of net cash. Did you ever discuss your payment terms with defendant Hess-Goldsmith?

A Yes.

Q And when did that occasion occur?

A -- The initial discussion was in 1958, when I met with them in New York.

Q Who was present at that discussion?

A Mr. Harry Goldsmith, Mr. Raymond Clark and Mr. William Colton.

Q Could you discuss -- and at this time we are talking about you representing Glass Fabrics, Inc. -- could you tell me what you said to any of these individuals and what they said to you?

A Well, it was a discussion similar, for the

same purposes, as I talked to Knisel about.

Q Please keep your voice up, Mr. Powrie.

A Yes.

The discussion was that we were past due on a portion, and I think about half, with Burlington of the $77,000 that Textura owed when I took it over.

I explained to them the business we were in, the reasons for operating on a different basis, that the net 30 terms they had been billing us on was something we couldn't live with for the reasons that I have enumerated, that we were a West Coast operation, there was a lag time on shipments, we were finishing our own goods, which took time, additional time, and we were dealing, or hopefully we were going to deal most of our business with the contracting trade, which was a delaying pay outfit, and we estimated it would take several months more than normal to receive money from our customers under those circumstances.

Q Was there an agreement reached by you, between you and Burlington, at that time?

A Yes. It was reached between me and Burlington's sales division.

Q And what were the terms of that agreement?

A They were that we would have extended terms

regardless of the printed invoices up to three months, four months.

Q And were there any other particulars of this agreement?

A Well, we were required to place large quantities when we placed a contract, and they agreed to hold these goods for us until they were called out, at which time we would be billed and at that time the extended terms that we were agreed to would start.

Q Was this agreement put into writing?

A No.

Q And why was it not, to your knowledge?

A They explained that it could not be put into writing, that it had to be an informal arrangement, because they had other customers that would want the same terms, so it had to be an informal writing that I would receive terms of 30 days and 60 days as I always had, but that informally we would handle it in a different fashion, and that I would pay on a 120-day basis.

THE COURT: Did they have other customers who were operating in this novel fashion that you were operating?

THE WITNESS: No. We were the only one.

THE COURT: So that you were unique, really, in the field?

THE WITNESS: We were unique and the only customer of any -- as I said, we finished our own goods, the rest of them all bought their own here.

BY MR. BURGESS:

Q Please keep your voice up, even when speaking to the judge, I would like the jury to hear your remarks.

A We were a novel, completely different customer. We were far away, which took shipping time; we finished our own goods, which took time; and we dealt with a different trade, which was unique at fiber glass industry. For these reasons they agreed to give us unusual terms.

THE COURT: There was a valid reason to distinguish you from other competitors?

THE WITNESS: Yes.

MR. BURGESS: At this time, your Honor, I would like to offer in evidence the Schedule No. 1 to Burlington's answer to interrogatories, which is a schedule of their account with Glass Fabrics, Inc. and subsequently, I believe, Textura, Ltd., running from October of 1962 through November of 1966.

A None.

Q And you testified yesterday that a practice obtained over the years in which Glass Fabrics did business with the defendants Stevens and Hess-Goldsmith whereby they followed the practice of paying their bills according to the terms of this oral understanding. Did this practice continue after Textura acquired the assets and liabilities of Glass Fabrics?

A Yes.

Q Did there come a time when you began to place orders with the defendant Clark-Schwebel Fiber Glass Corporation?

A Yes.

Q Will you tell the court and jury how you placed orders with Clark-Schwebel Fiber Glass Corporation?

A We placed orders with them in the identical fashion that we did with Burlington and J. P. Stevens.

Q Let me correct myself, Mr. Powrie, and I keep doing this. When I say "you," I am referring now to Glass Fabrics.

Now, did that practice, the way you entered into the contracts for orders of goods on behalf of Glass Fabrics from Clark-Schwebel -- did that continue after

THE COURT: Does this also have a back?

MR. BURGESS: Mr. McGanney advised me this morning that he would produce an example of an entire contract with the conditions of same appearing on the back.

THE COURT: All right.

MR. BURGESS: I would like to read on the face of this contract, Exhibit 15, as appears on the face of all the contracts, both these between Glass Fabrics and Clark and between Textura and Clark, under terms the printing appears Net 30 days, No anticipation allowed.

I'm sorry, Exhibit 63. I stand corrected.

MR. HARDISON: I am not sure that the reverse applies to all contracts, including Burlington co ntracts.

MR. BURGESS: I would like to read on the Hess-Goldsmith contract marked Plaintiffs' Exhibit 807 in evidence that after the word Terms appears the printing Net 30.

Q What did the defendant, what did Clark-Schwebel do with these fabrics that you ordered pursuant to these contracts? Let me show you them? After they wove them?

A They stored them in Anderson, South Caroline, and to some degree in a Los Angeles warehouse. That is, they had smaller amounts in Los Angeles, but basically they

stored them in the city where their weaving plant was in South Carolina.

Q Now, when Glass Fabrics wanted goods from Clark-Schwebel how did they obtain them?

A We notified them either through purchase order or letter, possibly by telephone, to send us a certain number, whatever we wanted.

Q I refer to your purchase order which has been previously marked in evidence. Is that an example of the purchase order that you would use to call goods out of Clark-Schwebel's warehouse?

A Yes.

Q When were you invoiced for these goods? After you called them out?

A At the time we called them out, at the time they shipped, rather, which was usually the same date, but it could have varied a few days.

Q I would like to show you a document on the letter-head of Clark-Schwebel Fiber Glass Corporation sold to Textura, Limited, dated 1/25/66 and ask you to identify that for the jury.

A This is a Clark-Schwebel invoice to Textura, Limited dated 1/25/66. It is No. 317. It is billing Textura for 502 yards of a fabric called 2411/2, which was

what we call Civic. It is $602.

Q Now, I refer you to the upper right-hand corner and ask you to read the writing after Terms?

A Net 30 days no anticipation.

Q Is that a representative invoice of the type that would be received by Glass Fabrics and later Textura over the years it did business with Clark-Schwebel Fiber Glass Corporation?

A Yes, it is.

MR. BURGESS: I would like to offer this in evidence if it has not already been.

MR. McGANNEY: No objection.

(Plaintiffs' Exhibit 808 was received in evidence.)

Q Did you ever observe these payment terms, the written terms specified on these agreements which we have introduced, these contracts and invoices that we have introduced into evidence?

A These 30-day terms?

Q Yes.

A No.

Q And to go back for a minute to the terms appearing on the Hess-Goldsmith and the Stevens contracts and invoices, did you ever observe the written terms appearing

on those invoices or contracts?

A No, we didn't pay any of our bills to any of those three companies in 30 days.

Q Or in 60 days, if that was the term specified?

A No, we paid them more on a hundred or more-plus days.

Q And was that in accordance with the oral understanding that you had entered into with Hess and Stevens?

A Yes, it went on for eight or ten years.

Q Did there come a time when you discussed with officers of Clark-Schwebel the terms upon which you were to do business with them?

A Yes.

Q And when did that come about?

A In 1961.

Q Prior to that time why had you not done business with Clark-Schwebel?

A They were not in existence.

Q When was the first time you approached them in order to do business with them?

A I think early 1961.

Q Whom did you approach?

A Mr. Raymond Clark, their president.

Q Did you have a meeting with him concerning the

terms upon which you were to do business with Clark?

A Yes.

Q What did you say to him and what did he say to you?

MR. TOPKIS: Objection. Mr. Clark is unhappily dead.

THE COURT: Is that the entire ground of the objection? I will take it on that basis.

Go ahead.

MR. BURGESS: I didn't understand your Honor's ruling.

THE COURT: I overrule the objection on the basis of the grounds stated.

MR. BURGESS: Thank you.

Q Could you tell the jury what you said to Mr. Clark and what he said to you?

A Well, our meeting on this point revolved around the fact that while they had opened their company and initially woven industrial goods, they were prepared to weave decorative goods and they were just getting into that. He told me this, and, in fact, there was some, if I remember, literature that they periodically sent out to me to indicate the progress of the construction of their weaving mill in Anderson, South Carolina, and I was told by Mr. Clark they

were initially going to weave industrial goods only.

In 1961 he said he was prepared --

Q Wait a minute, Mr. Powrie.

I would like now to confine my question to the payment terms and just in the interest of time, to the terms upon which you were going to do business with them. If you are leading up to that, fine. I want to save the Court and the jury time.

A I was leading up to it.

Q Continue, then.

A I'm trying to reconstruct the the conversation that included the terms, and that is how it happened.

Q I appreciate your difficulty.

Please continue.

A I showed him a sample book that we had and he went through the fabrics and indicated that they would like to begin with certain of the numbers, and I remember there was one called 3010. It was a very ordinary casement material. And he indicated they would start with that. So I placed an order with him for a certain amount, I think, some small amount, a couple of thousand yards. At the time I placed the order, the question of the terms came up. He, of course, had been president of Burlington's division and knew the terms, and I had arrived at these terms with

him in 1958. It was not a detailed discussion put in writing or marking any detail, but he understood the terms. But we did one more time review them, the fact that I would place an order only if they could hold the goods for me and not deliver them until I ordered them out, secondly, when I did order them out that I would have extended terms from the date of their invoicing to me, and those terms were to be around four months time.

He understood why, because in '58 we had been doing business with him through Burlington, and since that time, but the terms were reviewed briefly and instituted with Clark-Schwebel through Mr. Clark, extended terms.

Q I would like to again remind you, Mr. Powrie, to keep your voice up, and, with the Court's permission, if the jury doesn't hear what Mr. Powrie says, I would like them to indicate so we can make sure that you call can hear the evidence that is being presented.

Mr. Powrie, was this oral understanding that you entered into with Mr. Clark ever reduced to writing?

A No, it was not.

Q To your knowledge why was it not?

A For the same reasons that we did not reduce it writing when he made the arrangement with me with Burlington's Hess-Goldsmith dividison, he was not not interested in

letting his other customers know that he had special arrangements with us, even though our operation was sufficiently different to make these special arrangements, he didn't want it in writing because he felt he might be obligated to these terms to other customers.

Q Are you aware of any documents which refer or relate to this agreement?

A Yes.

Q I show you at this time Plaintiffs' Exhibit 55 and Plaintiffs' Exhibit 56 introduced into evidence initially and I will have a couple of other documents which were not introduced yesterday because we had difficulty obtaining a letter, which was part of it.

I show you herewith Plaintiffs" Exhibit 59 and Exhibit 412, and since you did not have an opportunity to look at 412 yesterday I would ask you to read that first very carefully.

THE COURT: This might be a good time to take a recess and give you an opportunity to read it.

(Recess.)

have you come across the term"extra dating"on other occasions?

A Extra dating, yes, I have.

Q What does that mean?

A It means a date beyond the normal -- extra dating, extended terms. It is a credit man's statement, use, language.

Q Thank you very much, Mr. Powrie.

Subsequent to the time that Textura acquired the assets and liabilities of Glass Fabrics, did the practice of paying according to the extended terms and the warehousing of goods until you call it out, did that continue with Textura in Clark-Schwebel?

A It continued until March of 1966.

MR. BURGESS: I would like to explain to the jury the exhibit which Mr. Hardison and I have stipulated in evidence, and that is the accounts receivable, or, rather, the ledger of Hess-Goldsmith & Company, Division of Burlington Industries, relating to the Glass Fabrics account.

THE COURT: Is that an exhibit?

MR. BURGESS: It's an exhibit. It is 806 in evidence.

This is a statement from the files of Hess-

Was it your understanding that Textura acquired the oral commitments of the defendants to furnish it with extended credit terms?

A Yes, it was.

Q Did you consider that a valuable asset of Glass Fabrics, Mr. Powrie?

A It was the basis for operation. We could not operate without it.

Q Mr. Powrie, turning to the subject of Fenestra Fabrics, were you an officer of the plaintiff Fenestra Fabrics, Inc.?

A Yes, I think I was president.

Q Who were the other officers?

A Fenestra was organized in 1960, so I presume the officers may have changed, and I don't know exactly, but they were either myself as president, Johnstone as vice-president, or perhaps Fred Ewing, and possibly Irene Sharpe as secretary. I would have to see the records. I just don't think we had that consistency, but I was consistently president and probably president-treasurer for a while.

Q Who formed Fenestra?

A Who formed it?

Q Yes.

A Well, I formed it for Glass Fabrics. Is that

the question?

Q Yes.

A Glass Fabrics formed it, but I had it done.

Q Who owned the stock of Fenestra?

A Glass Fabrics.

Q Now, in December of 1964 when Glass Fabrics' assets were transferred to Textura, did the transfer include the stock of Fenestra?

A Yes.

Q Going back to the formation of Fenestra, I would like you to explain to the jury how you came to form Fenestra and for what reason you formed that company?

MR. TOPKIS: Do you know when it was formed?

MR. BURGESS: That is stipulation of fact No. 6 in the order, January 4, 1960.

THE WITNESS: There were two reasons --

Q Before we get into that, I would like you to tell the jury what function Fenestra performed?

A Fenestra was the contracting arm of Glass Fabrics. They bid on the large buildings and took the contract and executed the contract.

Q When you say executed the contract, could you describe in detail the services they performed?

A Well, Fenestra's sales people would approach an

architect or an engineer in an attempt to sell him on our products, and their sales program included this sun controlled attribute that I think I spoke of. They would approach the engineer first, the purpose being to hopefully get him to specify our material, because if we got an engineer to specify our materials, it was tantamount to getting the order. Sometimes even though he specifies our material, and not frequently --

Q Please speak up.

A -- another competitive company would get the contract. That happened on rare occasions, but if it still happened, we still sold the fabric if it was specified. The specification was important and worked with the architects and the engineers. We spent a lot of time with the engineers. We would use our lead system first to show where buildings were being built, and the lead system, such as the Dodge reports would show. They come out very early and show that a building was contemplated at a certain location, approximately $20 million, approximately 20 stories or so, some such thing, and we would immediately get the engineer's and architect's name, as well as the owner, in these reports, these lead system reports, and we would have our sales people call on the engineers and architects, and this might be in as far

advance as two years of the actual making of the sale.

Q Subsequently after they made the sale did Fenestra perform the functions of installing the fabrics as well?

A Yes.

Q What function did Glass Fabrics perform in connection with Fenestra's activities?

A Glass Fabrics was their source of supply, that is, Glass Fabrics bought and warehoused the fabrics and other materials, the traverse track if they needed to perform a contract, and Fenestra did not own any of these things, so it bought them from Glass Fabrics before 1964 and from Textura, Limited after that date.

Q You have been speaking of Glass Fabrics and you have been talking about fabrics. You mean the fabrics purchased from whom?

A Well, the fabrics purchased from Burling and Stevens and Clark-Schwebel.

Q Now, subsequent to the acquisition of Glass Fabrics by Textura, what functions did Textura perform with relationship to Fenestra?

A The same one. They were the source. You see, our contracting company was an arm of Textura and Glass Fabrics; it was not separately financed, except for, I

think, we put $500 in, which was something just to form the corporation, so its source and this financing came from Glass Fabrics before 1964 and from Textura subsequent to 1964.

Q Just to clarify your answer, Mr. Powrie, Textura performed the same functions relating to Fenestra that Glass Fabrics had performed prior to the acquisition?

A That is right.

Q And this related to the purchasing of fiber glass fabrics from the defendant mills and supplying it to Fenestra when they bid on contracts?

A Yes.

Q Why didn't Glass Fabrics itself bid on cobtracts?

A Well, it had before we formed Fenestra, but we were beginning to get complaints about the fact that we were looking for these jobs and selling them direct, as it was called. We skipped over two profit levels to reach the building owner, and this was a new thing in the marketplace. The building owner had not purchased historically decorative coverings, except Venetian blinds, and it was up to his tenant to use draperies if he wanted to as a decorative measure. We, I think, sold and hung the first building in the United States where the owner purchased the fabric and Fenestra installed it. That was a building in

Seattle, a way back in 1959 or so.

Q Mr. Powrie, you said you came to form Fenestra because of these complaints. Could you be more specific about what these complaints were? What their source was?

A Glass Fabrics had been attempting to distribute fiber glass woven goods through the traditional channels, which were from converter level, which was our position as a purchaser of fabrics from the mills. They were supposed to buy and then sell it to the jobber who would then sell it to the decorator. This did not fit at all in a building owner's interest. This was something to do with the decorative side of things and had been done traditionally by the tenant. We were interested in furnishing the building owner, and no owner would stand for buying material at a markup of $10 a yard if he could avoid it.

Fenestra was to deal with the building owner. And we deliberately made these materials of a neutral tone. They were there to control the sun and was an improvement on Venetian blinds. So the owner was interested. But he was not interested in our referring him to a decorator. So we were involved in selling to the owner in the construction of the building, and this caused complaints from almost every source in the textile

business, complaints from our customers, from people involved in the decorator side of the business.

I received many calls from people in the decorating business who complained that we were selling direct and they were apprehensive. It made them apprehensive. But the fact was you could not get a decorator to write up a contract for 140 Broadway any more than he would think about it. But if he saw our materials hung, he would complaint. And then there were competitors of ours, like Ben Rose and Qual-Fab and Thorcel.

Q Do you recall any specific occasions when you received any complaints from any of these persons or any of these competitors?

A Well, through the years it was something we lived with. It was continuous, hundreds, I would suppose. It did not divert us because we were not interfering with that type of business. It was a new business that we created. The fabric could not have been sold if we had not sold it.

Q Did you receive any complaints from any personnel of Owens-Corning Fiberglas about the way you were doing business?

A Yes, we received complaints from everybody, including the mills, but Owens-Corning Glass, Bill Rader, who was

all of this is relevant to the motive for the defendants for entering into the conspiracy, but I also --

MR. HARDISON: What?

MR. BURGESS: -- also in terms of the reasons for forming this company.

THE COURT: You tell me the purpose of this was to show why Fenestra was formed. How you are introducing conversations long after Fenestra was formed.

MR. BURGESS: I will withdraw that then, your Honor.

Q Mr. Powrie, did there ever come a time when you had any conversations with anyone from defendants concerning the way, the manner, in which you did business?

A Yes.

Q Could you tell the jury when and where that occurred and who was present?

A I am not sure of the exact date, but I recall being in New York, and I think in 1961, and I think it was 1961 because it was identified in a conversation by the fact that we were expanding and we were going to open offices in New York, and --

Q Excuse me, Mr. Powrie. You said 1961 --

A I meant to say 1964. We were expanding

to New York, and this is the background of the meeting. Mr. William Colton of Burlington, when I was in New York on other business, I had stopped in his office on business with them and he invited me to lunch. I am not certain, but I think it was the Weavers Club. I had been there once, and I think it was with him.

During the course of the luncheon he made the remark --

Q Please speak up, Mr. Powrie. I am afraid the jurors aren't able to hear you.

A He made the statement that if he had the ability to do so he would not sell us any further, and I asked him what he was talking about. He said, "Well, Mal, we have been getting so many complaints from our other customers that if we had the option we would not take you on today as a converter, and if we could figure out a way how to do it we would no longer sell you."

Q Did he mention any specific customers of Burlington when he was talking about these complaints from other customers?

A Yes.

MR. TOPKIS: Your Honor, could the jury be cautioned, or would your Honor rule, that any state-

ment by Mr. Colton of Burlington is not binding on either J. P. Stevens or Clark-Schwebel at the present time?

THE COURT: They are so instructed. As matters presently stand they are not binding on anybody but the particular company with which the individual was connected.

MR. BURGESS: Could you read the question back, Mr. Court Reporter?

(Question read.)

A He mentioned Thortel and Qual-Fab, I am certain of that -- not certain, but I think he mentioned Ben Rose of Chicago.

Q Were these companies, Thortel and Qual-Fab, competitors of yours?

A Yes.

MR. BURGESS: I am about to enter into a different subject.

THE COURT: Go to lunch and come back at 2 o'clock.

(Luncheon recess.)

to the expansion of Glass Fabrics, let's say for a year, taking the years 1962 and 1963, where did Glass Fabrics do business?

A In 1962 and 1963 we were principally a West Coast firm. We did some small amount of business in Texas, but we were in Washington, Oregon and California, if I recall.

Q With some business in Texas, you mentioned?

A Yes.

Q When did you start to branch this Glass Fabrics out?

A I think it was probably after the first quarter of 1964 that we opened other offices.

Q Could you describe to the jury and the Court what new offices you opened?

MR. TOPKIS: Could we know when each new office was opened?

THE COURT: Ro ughly, yes. We don't need the exact date

THE WITNESS: I don't think I can say exactly when.

THE COURT: Well, the year.

THE WITNESS: Well, during the year 1964 we opened an office in New York.

Q Pleas speak up, Mr. Powrie, and direct your answers to the jury.

A During the year 1964 we opaned an office in New York City. For some time we did not have an orfice. Mr. Nicholas Roach was hired first and he was our representative here without an office. The office was opened at 71 Vanderbilt Avenue in Grand Central Station. I don't know the date. But it has to be in '64 some time.

Q That will be sufficient, Mr. Powrie.

Will you continue?

A Are we on the subject of opening more offices now?

Q Yes.

A It was after we had had a representative in Chicago that we opened an office, and I don't know that date, but it was part of this general expansion program, the last half of 1964, perhaps In 1965, I would say, these offices were instituted.

Bob Johnstone, who had been a stockholder, left the Los Angeles area and opened an office in San Francisco, along with Frank Farrell, who was one of our sales people.

We had representatives who had offices in Mexico City and in Melbourne and Sydney, Australia. We didn't maintain offices, other offices in the United States, but

we did appoint representatives in most principal cities.

Q Could you name those cities, Mr. Powrie?

A We had one in Portland.

Q What was his name?

A I think it was Andrus. I'mo not sure. I could find the name. In Minneapolis we had a representative, and these names were very familiar to me once, but I can't name him. I will get his name if you want it. We had a representative in Texas. His first name was Bob, and he was a former employee of ours.

We had prior to that had a man who was in the drapery business in Texas, but we went with our own man after that.

We had in Kansas City a company called Kansas City Slate Company, who contrary to their name were not in the slate business, but they were in our business and they were selling application tile. We met them through Corning-Owens Fiberglas.

Q How many additional sales personnel were added to the company as a result of your expansion?

MR. TOPKIS: When?

MR. BURGESS: The period of expansion was identified as 1964 and 1965.

A How many total number?

Q How many total additional sales personnel did you add?

A I think we went from about six to, I think, 23 that attended our sales meeting in Los Angeles in May, 1965, and they were mostly new people that were meeting for this big sales meeting that was a culmination of naming new sales officers and sales people. I didn't include anybody from Australia or Mexico City. It was just the United States people and they weren't all there, so I would have to guess at that time we had 25 new outlets.

Q Did you make any changes in your production department or were there any additional developments or procedures or departments instituted in this area?

A Yes, we had been in a small quarter, but it was a building about 50 feet wide by 90 feet deep, one level. That was at 620 Almont.

We found a building in Beverly Hills, in the small industrial area that had been a former ice house that had to be done over to offices in the front of it and warehouse space in the back, and that suited us just fine, and I think we must have taken on 10,000 square feet.

We had created a fabrication division which we had never had before. We had contracted that work out to various people. We thought it would be better control

if we owned it ourselves, which it was, and we bought machinery for that and expanded that. That occupied about half of our warehouse area.

The expansion of our inventory required more space, and that occupied about a little better than a quarter of the area, and then we had a shipping-receiving, inspection and grading, and all those things near the elevator, which was still in the back end.

In the front end we had very considerable expansion compared to what we had before. We had rather nice offices because we were dealing with people that expected it, especially when you deal with an architect, he kind of grades his customers by the way they look and the way the premises look. So we have nice offices.

I had a rather nice office, and alongside of it was a big meeting room for our use, but it was principally created for conferences with architects and engineers, where we would show them blueprints and fabric and performance and that sort of thing.

Next to my office was my secretary's office, and then we had a switchboard and reception area out near the elevator, and behind that was the counting division, which was a room about 9 by 9 formerly, and this was, I would say 30 by 20, and it made room for Miss Sharpe, who

was our bookkeeper, and two assistants, plenty of room for records.

The rest of the space in the front, as we called it, was occupied by the salesmen's desks, and we had room for ten of them in the Los Angeles area and we had the lead system room that I was telling you about with the lead that we call SCAN, which was a machine, and then you were sent on a subscription basis the films showing blueprints on buildings. This was a Chicago firm.

Q Now, Mr. Powrie, you mentioned lead system. Could you tell the jury what is a lead system, and how did you use it in your business?

A Well, in Los Angeles we could go downtown, for instance, and we could see what was under construction, since we lived --

Q When you say"what was under construction," you mean buildings?

A Commercial buildings. You could see they were under construction, so you went to them to contact them and attempt to sell them our product.

When we weren't in our own city we didn't know what construction was going on, so we subscribed to the Dodge Reports. These Dodge Reports was one system. We also subscribed to area systems for our sales people -- that is, a certain area of the United States was better served by a local system of leads than the Dodge system was.

We must have had three, four, five different types of that. And then we had the Scan, the one that really did it. You see, we could take Scan's lead system and using their blueprints sent to us on a reel which magnified it on a plate we could read, we could actually draw off a blueprint from the

plate rather than go to the architect and ask for a set of blueprints, on which you could draw off figures to include in a contract.

This we took on in the middle of 1966, I believe.

Q I am asking you the questions, Mr. Powrie, but I wish you would direct your answers to the jury and speak up.

Again, I would ask the jurors, if they can't hear Mr. Powrie, please let me or his Honor know and we will ask him to raise his voice for you.

Now, you have testified that these things were instituted as part of your expansion, and you also mentioned that you moved to more comfortable quarters. Were these offices you moved to more lavish than the ones you had prior previous to that occupied?

A Considerably more so, yes.

Q Why did you move to more lavish offices?

A They were really a little more lavish than we intended, but one of our finer sources of business was Welton, Beckton, a fine architectural firm with offices in all principal cities, and working with them through the years we got a great deal of business

just wanted to remove what we felt was an incorrect impression left by the opening statement.

MR. TOPKIS: So it won't be a week before we get this straightened out when we are done with Mr. Powrie, I said nothing about 1964. I said, and the record is clear -- as I say, Mr. Powrie in 1964 invested in this company called Textura, which had been founded in 1962. I think it was reasonably clear.

MR. BURGESS: The implication was that the investment was made in 1964.

THE COURT: Please continue.

BY MR. BURGESS:

Q Turning to the subject of quality of the goods delivered to you by the defendants, Mr. Powrie, did you experience generally quality problems in the fabrics delivered to you by defendants?

A Yes, we had an on-going quality problem that we lived with from the first day we bought from them.

THE COURT: I think you have to separate the defendants. It's a pretty broad statement.

MR. BURGESS: I know, your Honor. I will rephrase that.

MR. BURGESS: I think I can focus it for them. I am talking about the years 1961 up until the death of Mr. Clark in October of 1964.

THE COURT: That's good.

Q Do you have any independent recollection, Mr. Powrie, of what fabrics you experienced quality difficulties with?

A Yes. A clear recollection. We had purchased from 1961 through 1964 11 different weaves from Clark-Schwebel. Of those weaves there were two that were acceptable without flaws -- that is, without an unbearable amount of flaws -- but there was one we continued to buy but had substantial flaws. The rest of them --

Q I know the jury is tired of hearing me say this, and I know you and the court are too, but please raise your voice when you answer the questions and address your answers to the jury.

A From 1961 to 1964 we bought 11 fabrics that we put in our line -- I better say it that way, because there were other fabrics that we bought but were of no consequence because they were a short run or something and we didn't repeat.

We had 11 fabrics to put in our line. And

Q Did there come a time in 1964 when you submitted certain fabrics? I would like you, first of all, to name the styles of fabrics, if you can under your independent recollection, the styles of fabrics from Clark-Schwebel with which you had quality problems.

THE COURT: This is up to October of 1964?

MR. BURGESS: Up until October of 1964.

MR. TOPKIS: Could I inquir before we go into this, this case does not involve quality products up to 1964.

MR. BURGESS: If he wants to talk about fabrics on which there was quality problems throughout the career of Glass Fabrics and after --

MR. TOPKIS: I would like to focus on what this case is about, a conspiracy starting some time after '64.

MR. BURGESS: I think I can bring the matter to a head with no problem at all, if you will permit me.

THE COURT: Go ahead.

Q Mr. Powrie, were you satisfied with the quality adjustments which you obtained from Clark-Schwebel prior to 1964?

A Yes.

Q What happened in October of 1964? Did anything happen to change that relationship?

A The policy of the company changed with respect to our company and quality matters upon the death of Ray Clark, which I think was October 4, of 1974. Prior to that time if I had any problems with adjustments I went to him and he agreed that we were entitled to those adjustments. After that time we received no adjustments for quality at all.

Q Mr. Powrie, could you name for the jury the fabrics upon which you were having quality problems at the time of Mr. Clark's death? After Mr. Clark's death?

A It is easier to name out of the 11 those with wich we had no problems, and that was Morro, Linweave, and we would have continued to use Shepard, I think, but it had quality problems. Those fabrics we could have continued with. But the ones we could not continue with were Spartan, Shepard, Glacier, Civic -- I don't know how many I have named here, but there were 11, I recall, and two and a half of them were good.

MR. BURGESS: May I just be excused for a few minutes. I have a package of documents I would like to get.

THE COURT: We will take a short recess.

MR. BURGESS: Yes, please.

(Recess.)

Q Mr. Powrie, could you discuss very briefly, did there come a time -- I think one of these contracts is already in evidence, your Honor, and I will simply rely on that -- did there come a time when you placed orders with Clark-Schwebel Fiber Glass Corporation for a style entitled Civic 52?

A Yes.

Q Referring to Plaintiffs' 84, the group just marked in evidence, does that represent your contract for Civic 52, that group of documents?

A There was one contract with these papers, and it is a portion of the contract. The original contract was for 100,000 yards of this style, Civic. As it was in weaving -- and that order was placed to do the Chicago Civic Center job -- while it was in weaving we decided to split this contract in two and make -- the Civic Center job took 48,000 yards, so we split the 100,000-yard contract in two, approximately, and Clark-Schwebel wove under one contract 48,000 yards for the Civic Center in a 52-inch width, and drew up a contract for 45-inch width that was to be put into colors for our general line use.

Q With respect to the 45-inch contract, which was marked as the top number in Plaintiffs' Exhibit

63 for identification, did you have an agreement with Clark-Schwebel to place that -- that that fabric should be placed in colors?

A Yes. Civic Center was in white, and that was a very unusual color to use in a commercial building. I don't remember another job where we used it. So any contract we placed was for a line of colors as we submitted them.

Q Very briefly, Mr. Powrie, tell the jury the quality problems that Textura experienced with both of these fabrics.

MR. TOPKIS: Excuse me, your Honor. Couldn't we shorten this? We will stipulate there were some quality assertions made by Textura and Clark-Schwebel disagreed, and whatever the facts are. Couldn't we do it in some faster way?

MR. BURGESS: I think this is relative to the motive for the conspiracy.

THE COURT: If you think it is relative you are certainly entitled to put it in. All we are talking about is an accumulation, it being cumulative.

MR. BURGESS: Exactly, your Honor.

(Question read.)

A The 52-inch fabric for the Chicago Civic

Center in this style, Civic, we lost 6900 yards due to poor quality. We had to throw it away.

In the second contract, which was the split of the original 100,000 contract for 45-inch goods, on their first attempt to put color on it it revealed quality problems so that it was unusable. We never did buy any more of that 45-inch Civic for that reason.

Q Did there come a time when you addressed a complaint to Mr. Nordheim concerning these fabrics?

A Yes.

Q I show you a letter, Plaintiffs' 102, dated February 3, 1966, and ask you if you would identify it for the jury.

A This is a letter dated February 3, 1966. It is addressed to Mr. Nordheim and comes from me.

MR. BURGESS: I offer that in evidence.

MR. TOPKIS: Does that have attachments of inspection reports? Is that the document?

MR. BURGESS: Yes.

MR. TOPKIS: There is no question the document was received, your Honor. So far as the so-called inspection reports are concerned, we have no objection to their being received for the proposition that they were received, but whether they are true or

not I have no idea. They are hearsay, obviously.

(Plaintiffs' Exhibit 102 received in evidence.)

MR. BURGESS: I will briefly read this letter to the jury.

(Mr. Burgess read to the jury from Plaintiffs' Exhibit 102 in evidence.)

BY MR. BURGESS:

Q Mr. Powrie, did you ever receive any adjustment from Mr. Nordheim, or anyone else at Clark-Schwebel, concerning the Civic fabric?

MR.TOPKIS: By"adjustment" does the question mean a response to this letter?

MR. BURGESS: A credit?

A No.

MR. TOPKIS: It doesn't ask for a credit.

THE COURT: You can bring it out on cross examination.

MR. TOPKIS: Very well, your Honor.

Q Mr. Powrie, I show you Plaintiffs' Exhibit 104B for identification, a letter dated February 15, 1966, from Mr. Nordheim to Mr. Powrie.

MR. BURGESS: I offer that in evidence.

MR. MC GANNEY: No objection.

THE COURT: It will be received in evidence.

(Plaintiff's Exhibit 104B was received in evidence.)

Q Mr. Powrie, will you hand me that letter, please.

With reference to a sentence in the second part of the letter, "We are of the opinion that if you can get agreement for this 10,000 yards to be installed in white there should be no major problems."

Now, was it feasible for you to take this material in white?

MR. TOPKIS: Objection, your Honor. If part of this document is going to be read, I would suggest to the jury so the jury can understand what is going on that the entire document be read.

MR. BURGESS: I have no objection to that.

THE COURT: Read the document, but read only those documents in full if there is reason to do so, because we are taking up a lot of time reading documents.

(Mr. Burgess reads from the document in evidence to the jury.)

Q With reference, Mr. Powrie, to the statement:

"We are of the opinion that if you can get agreement for this 10,000 yards to be installed in white there should be no major problems."

Was it feasible for you to take this fabric in white?

A No, we couldn't sell a color white on a commercial

job.

Q Was one of these jobs that you did with this fabric in white?

A Yes, the Chicago Civic Center. We did two in our entire history of 13 years, the Norton Building in Seattle was white and the Chicago Civic Center was in white. There was no way to sell this job in white. I tried.

Q Did Clark-Schwebel ever issue to you return authorizations for goods that were delivered by them to you?

A Yes, I think we got maybe four or five of return authorizations from 1964 on.

MR. BURGESS: I offer at this point Plaintiffs' Exhibit 93, a letter on the letterhead of Clark-Schwebel Fiber Glass Corporation, Return Authorization No. 90-2, dated January 6, 1966.

I offer that in evidence.

MR. TOPKIS: No objection, your Honor.

(Plaintiffs' Exhibit 93 was received in evidence.)

MR. BURGESS: I offer at the same time Plaintiffs' Exhibit 95 in evidence.

MR. McGANNEY: No objection.

room?

A Well, we asked one of the people, and I think it was George Yarn or somebody that helped him bring rolls of cloth up to what we call a measureograph. That is a machine that you can put bolts of cloth on and it will count the yardage; it is power driven. And, also, you can use it as an inspection machine. It has a light behind the fabric so it brings it out and you can look through the fabric as you would at a window and you can see the flaws if they exist.

We put quite a number of rolls on. I think he was with me all morning.

Q Could you name some of the fabrics you put through the machine?

A Well, we put Spartan through the machine, we put Civic, Glacier, Homespun, probably two or three more.

Q Could you tell me what was said by any of the principals at that meeting?

A Well, as we put one roll after another on and stopped it -- you see, the machine had a crank and we had an inspector whose job it was to look at fabrics all day long, and you could stop the machine when anybody wanted to, and at certain places as flaws appeared, one of us or more of us or Mr. Nordheim or myself would stop it to show a

type of flaw, and we would talk about the flaw, and Mr. Nordheim would look at it. He was the weaving man and he would inspect the flaw to decide what caused the problem. It might be a broken yarn or slubbing. That is where a yarn attaches to itself by wrapping around so it creates a lump. There might have been holes; there were holes; every conceivable type of flaw in the fabric can be seen in this machine.

So as we moved along we would stop the thing. It took several hours, I would think, to inspect a number of fabrics.

As we got toward the end of the review of the fabrics I said to Mr. Nordheim, "Well, now, Ray, you see what crap you have been sending us."

Q Did he respond to that remark?

A He said, "This is not crap; this is shit."

Q Following that meeting did you hear from Mr. Nordheim concerning these fabrics?

A Well, we went together to the Los Angeles drapery show at the Ambassador Hotel and we discussed it then and I was trying to get him to take a position. I asked him what his decision was going to be. He said he must return to New York and talk to Mr. Schwebel about the problem.

A December 27, 1965, to Mr. Mal Powrie, Textura, Ltd., 9348 Santa Monica Boulevard, Beverly Hills, California.

"Dear Mal:

"With reference to the 6 per cent interest on overdue invoices, we are referring only to those invoices which are still outstanding as of January 1, 1966. Therefore, this is not a retroactive interest charge.

"We look forward eagerly to the $24,786.02 which you indicated you would pay us in either one or two payments on or before December 31, 1965. Needless to say, these bills were due for August, and we still have $29,470.89 which was due in September, which we would also like to receive.

"Due to the considerable amount of money outstanding and per conversations we have held up all shipments until this matter is straightened out."

Copy to Mr. A. Friedman, and signed by Mr. Raymond Nordheim.

Q To your knowledge, was that the first time you had been charged interest by Clark-Schwebel?

A Yes, this was the first time we had ever been charged interest, the first time they had ever held up shipments also.

with your understanding as to the extended credit arrangements which you had with Clark-Schwebel?

A Well, the first one does, the first one totaling $34,000, dated February 28, 1966 shows the balance at that time and that conformed to our understanding.

The second one does not. It brings our account up to $115,131, and it was in complete violation of our understanding. We had not called these goods out, in other words. They were arbitrarily billed to us.

THE COURT: Is one included in the other?

THE WITNESS: Yes, one is included in the other.

Q Could you please identify it by plaintiffs' exhibit number which statements you are referring to?

A 104-D is a statement dated February 28, 1966, and the total amount is $34,007.92.

Exhibit 105 is a statement dated March 15 and the total is $115,131.07.

Q Did you subsequently return those invoices to Mr. Nordheim?

MR. TOPKIS: They are statements.

Q -- statements to Mr. Nordheim?

A First of all, these seem to be illustrative of the position before and after, but following the statement that showed a $34,000 balance he sent me invoices, not a

statement, but invoices in two quantities; one was for goods on hand in Los Angeles and the other was for goods on hand in South Carolina, and I think those invoices total 87,000 or some such figure, but the difference between this invoice and this invoice, the difference between 34 and 115 is the amount we were billed.

THE COURT: Representing this 80 some-odd thousand dollars which was the difference between the 34 and the 1115?

THE WITNESS: Yes.

THE COURT: That represented fabric in storage, so to speak, in warehouses which you had not called out?

THE WITNESS: Yes.

Q Mr. Powrie, do you know of your own independent recollection what that $87,000 represented? What fabrics it represented?

A It represented all fabrics that had not been shipped to us that were being held by Clark-Schwebel. I'm not certain, but it may have included yarn that they had not woven into goods yet.

THE COURT: Do you know that or don't you know that?

THE WITNESS: I'm not certain, no.

Q Did it include the fabric Spartan?

A Yes.

Q Did it include the fabric Civic?

A Yes.

Q Did it include all the fabrics that you had been discussing quality problems about?

A Yes, it did.

Q Now, these invoices which you have just referred to in testimony, Mr. Powrie, did you subsequently return those to Mr. Nordheim?

A Yes, I returned them with a letter.

MR. TOPKIS: May we see the letter, other than the witness' testimony about it?

MR. BURGESS: I was going to introduce it now.

Q I show you a letter addressed to Mr. Nordheim from Textura, Limited dated April 7, 1966.

THE COURT: Do you recognize the letter?

THE WITNESS: Yes.

(Plaintiffs' Exhibit 824 was received in evidence.)

MR. TOPKIS: Excuse me, your Honor, may I say that we have never before been furnished a copy of this letter, I am advised by my colleagues, and, hence, I suppose it is Mr. Powrie's testimony chat this is a copy of a letter he wrote. On that ground we don't object to it, but certainly we should have received it years ago.

Q As of this time, Mr. Powrie, what was the status of Textura's account with Clark-Schwebel?

MR. TOPKIS: That is what the statement says.

MR. BURGESS: I will rephrase the question.

Q Was Clark-Schwebel selling you goods, Mr. Powrie?

A As of April 4?

Q Yes.

A Yes.

Q On what basis?

A For cash only.

Q Were they processing new orders for you?

A No.

THE COURT: We will take a recess now.

(Recess.)

BY MR. BURGESS:

Q Mr. Powrie, before the time of early March when Mr. Nordheim sent these letters to you that we recently had been discussing, had Clark-Schwebel ever before billed you for goods that were held in storage but not called out?

A No.

Q So is it your understanding that this was contrary to the agreement between yourself and Clark-Schwebel concerning that function of the extended credit terms arrangement?

MR. TOPKIS: Objection, your Honor.

THE COURT: Calling for his understanding does not prove what the agreement was, merely his understanding.

MR. TOPKIS: Right.

THE COURT: I will permit it for what his understanding was.

A Yes.

Q Now, the statements which have been marked in evidence before you, you mentioned one, I believe, and you have the index numbers before you, for $34,000 and one for $115,000, I believe, and one for $95,000, if you will just refer to those totals and make sure I have the correct amounts?

A 104-D totals $34,000.

105 totals $115,131.

THE COURT: Does the hundred and fifteen include the thirty-four?

THE WITNESS: Yes.

THE COURT: So you don't have 34 and 115?

THE WITNESS: No, I was responding to the totals on these two statements.

Q Mr. Powrie, are either of those statements correct?

A Well, 194-D I would say is correct in that it

represents a total owed to Clark-Schwebel as of February 28 of $34,007.92.

The correctness of it is that we received by agreement these invoices and accepted them and they totaled 34,000. I think that is correct. But as a reflection of what we owed them, I would quarrel with that because we had the quality problem going.

Q Referring to the second statement, Plaintiffs' Exhibit 105, for $115,000 approximately, was that statement correct?

A No, this is incorrect on both counts, that is, we owed them only $34,000 on accepted invoices under our verbal agreement not to bill us until we called out, and this total is $115,131, so the difference between 34 and this 115 is incorrect under our understanding of when we would be billed, and, of course, it includes all the problems on quality, the dispute that had been going on since 1964.

Q Did you subsequently regarding the amount of $34,00 that is reflected by the first statement and is included in the second statement, have discussions with Mr. Nordheim concerning the payment of a portion of that amount?

A Yes.

Q Could you describe in detail how that came about?

A Well, the 34,000 was an amount we were holding -- we were not holding that amount, but we had told Mr. Nordheim we were going to hold 30,000 until the qualify dispute was settled. And we had a number of telephone conversations after the March 1st letter wherein we were put on cash so we were paying cash and our account did not change with them, that is, it stayed static as far as invoices received on a credit basis.

In attempting to resolve our difficulties over quality and our total problems that had peaked out March 1st, we were in contact with each other by telephone and trying to determine a way to get out of the problem that we were in in the sense that Mr. Nordheim indicated that they were not all that enthused about going to arbitration, that this was rapidly coming to that point, and that arbitration was costly, and he reminded me that back of the invoice we must go to arbitration on this dispute.

THE COURT: Is that on the back or front of the invoice? 3

THE WITNESS: On the back of the contracts.

THE COURT: I may be wrong.

MR. BURGESS: It is the back of the contract, Plaintiffs' Exhibit 800.

THE COURT: It doesn't matter, but I thought I

saw it in the front of the invoice.

A (Continuing) He arranged a meeting to settle our quality problems and asked me to come to New York and told me that Mr. Schwebel would for the first time participate. I was to meet with Mr. Schwebel and Mr. Nordheim and hopefully come to some solution as to the troubles we were in. He said, however, that holding $34,000 of their money did not create a good atmosphere to negotiate from, and I had to agree with that.

So he said, "Send us $20,000 and reduce it to what would be $15,000 in ro uch figures, so when you do come to New York and you do sit down with Mr. Schwebel we don't have that big a problem."

He said I should hold the $15,000, that was okay, but not the 34.

So I sent him a check for something short of $20,000, which brought our account down to $14,800.

MR. BURGESS: I offer a letter dated April 6, 1966, addressed to Mal Powrie from Raymond to Nordheim, president.

MR. TOPKIS: No objection.

(Plaintiffs' Exhibit 826 was received in evidence.)

Q Did you pay the $20,000 on the understanding

$35,000 outstanding and that you woulod call in a few days to establish a mutually acceptable date for the necessary discussions which would be held here in our offices in an attempt to resolve our problems."

MR. TOPKIS: Aren't we going to get the rest of the letter? I don't care.

MR. BURGESS: No; that is all.

Q Did you subsequently go to New York and meet with Mr. Schwebel and Mr. Norheim?

A Yes, I sent a check to him first for about $20,000 and then I went to New York and met with Mr. Schwebel and Mr. Nordheim, I think it was, in the middle of the week in April, about the 27th of April, the 25th of April.

Q Could you describe what occurred at that meeting?

A Well, the meeting which I thought I was going to discuss quality problems and possibly settle our dispute with Mr. Nordheim and Mr. Schweibel , they were not interested in talking about quality, they were interested in demanding a personal guarantee from me and a personal guarantee from Mr. Grafstrom, who owns stock in our company.

Q Did they, in fact, demand a personal guarantee from you at that time?

A Yes.

MR. TOPKIS: Could we just have the conversation?

THE COURT: Yes.

Q Tell us what you said to them and what they said to you?

A This was a meeting that lasted about an hour and all that was discussed is why I wouldn't give them a personal guarantee, and they were demanding that I ask Mr. Grafstrom for a personal guarantee. I told them that Mr. Grafstrom was an investor in the firm, that I doubted very seriously that he would give any guarantee, that I would certainly under the circumstances not ask him to and I wouldn't give him one, either. We left that meeting agreeing to meet again on the next Friday, the end of the week, for more discussions. They asked me to come back.

Q Did you, in fact, come back?

A No, I did not. I knew I had been had for $20,000 and that there was no way to work with Clark-Schwebel on an honest evaluation of a very, very serious quality problem with my company. So I went back to Los Angeles.

Q Did they submit to you at that time any documents concerning your styles, concerning the styles which they held for you in storage that they had billed on these state-

ments?

A Yes, they sent a letter containing a status report, as we call it, to me at our office in New York, at 71 Vanderbilt. I think I got it Thursday. Mr. Nordheim's intention was to get it to me so we would have it by the meeting on Friday.

Q Is this Plaintiffs" Exhibit 116? Is that the document to which you just referred?

A Yes.

MR. BURGESS: I would like to offer that in evidence.

MR. TOPKIS: With the enclosures?

MR. BURGESS: Yes.

MR. TOPKIS: No objection.

(Plaintiffs' Exhibit 116 was received in evidence.)

xx Q Mr. Powrie, what was the next step that occurred in connection with the dispute between yourself and Clark-Schwebel? What happened after that?

A Well, I returned to Los Angeles and was in touch with Clark-Schwebel, Mr. Nordheim, and several telephone conversations. This is the area of time in which he began to talk about putting the matter in arbitration, and we were discussing that back and forth on the telephone, and we con-

tinued to discuss the amounts of money involved in the credit disputes and what I was asking and what they were talking about.

We discussed the attempt to settle and principally I would think quality problems. It was a continuation of what we had been discussing.

Q I hand you two letters, dated May 6, 1966, one regarding the order on the style Morro, and the second one -- well, let's deal with one at a time, May 6, 1966, addressed to Mr. Raymond Nordheim from yourself.

MR. BURGESS: I would offer that in evidence.

MR. TOPKIS: No objection.

(Plaintiffs' Exhibit 827 was received in evidence.)

Q Mr. Powrie, that letter which relates to canceling your order on Morro, why did you cancel that order?

MR. TOPKIS: Objection, your Honor.

THE COURT: Why don't you read the letter.

Q Read the letter.

A May 6, 1966, Mr. Raymond P. Nordheim, 50 Rockefeller Plaza, New York 20, New York:

"Dear Ray:

"As I recall you were holding up our order on our style Morro (your style 24117/3) pending settle-

"Enclosed find a rough outline of what the quality problem on several of your fabrics has cost us.

"As you know, we have not yet replaced the Perini job (Golden Gate Apartments) but list it because we soon must do so.

"You may wish to minimize damages by furnishing the replacement fabric on that one but let us know since we must give them an answer.

"Sincerely,

Textura, Ltd., M. G. Powrie.

"Enclosure: Record of quality problems on various jobs."

Q Mr. Powrie, what position did Clark-Schwebel take after this point regarding quality adjustments?

A Our position changed only in that they took some initiative to call and talk about them. Nothing else changed. We didn't get any credits or any serious proposals. We discussed some figures on the telephone, I remember.

Q Did there subsequently come a time when you and Mr. Nordheim had a conversation concerning the possibility of them taking you to arbitration?

A Yes, that conversation went on from the time I was in New York until into June, and we discussed what

might happen on arbitration on a number of occasions. I recall one phone call from Mr. Nordheim, it must have been pretty close to the 1st of June because I identify it with the date of going to arbitration, which was June 9th, I think. We were talking about, and I told him that if arbitration was similar to being sued for the amount of money he was talking about, which was a whole lot of money for our firm, that it would have a poor effect on our credit, and I said to him, "Ray, you know what effect this will have on our suppliers' -- and we had been talking about suppliers in the context that he was a supplier, so we were talking about Hess-Goldsmith and J. P. Stevens -- the effect on them if he sued us for this amount of money. And he had a figure going up to 80s and $90,000.

He said, "Yes, I know the effect, and we will crucify you."

Q Thank you, Mr. Powrie.

Now,did there come a time shortly after that that Clark-Schwebel did institute an arbitration for the amounts -- in the amount of $92,000 against Textura?

A Yes.

MR. BURGESS: I would like go offer plain-

MR. HARDISON: Of course Burlington wasn't involved in the settlement of the arbitration. You are not suggesting that, are you?

MR. BREINDEL: I think that is a jury question, your Honor.

THE COURT: Let's not have so much colloquy.

Q Referring to Plainiffs' Exhibit 145, does that refresh your recollection that on or about July 6, 1966 you discussed with Mr. Nordheim settlement of this arbitration?

A Yes.

Q At that time did he mention any particular terms to you?

A These are notes I took of a telephone conversation, and they do refresh my recollection that we discussed what's on these notes.

Q Could you tell in your own words what were the terms that Mr. Nordheim offered to you?

A Well, there were a number of these, but this is an indication that --

THE COURT: Has this been marked for identification?

MR. TOPKIS: It bears an identifying number,

your Honor. It hasn't been received in evidence.

THE COURT: No, but at least it is identified so we know what it is?

MR. BURGESS: Yes.

A It is some notes in my handwriting and lists the fabrics on the left-hand side and there are two headings on the right which apply to each weave, four of them in this case.

MR. BURGESS: Since the witness is reading from a document I would prefer it be offered in evidence at this time.

MR. TOPKIS: I don't object.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 145 was received in evidence.)

THE COURT: You have no independent recollection, I take it?

THE WITNESS: Not at this particular point.

THE COURT: That's all right.

Q Could you read that document to us, please, Mr. Powrie?

A Well, it says, "Nordheim 7-6-66." With reference to the fabric Spartan he apparently was talking to me about offering it to us at -- well, offering it

direct to us at 30 cents a yard on 4500 -- 4565 yards. He was offering this kind of a settlement. That would be $1392. And on the fabric Spartan he was offering a credit of $1392.

On the fabric Civic he was offering a credit of $4026.

On the fabric Glacier he was offering a full credit of $618. Pardon me. He was offering 33-cents-a-yard credit for $618.

On Civic he was offering 63 cents, which is $882.

In total, on these four, he was offering $6918 in settlement of our quality problems.

There are notes further. It says, "Above conditioned on the following payments: $25,000, August, $25,000, September; $16,000, October.

Q Did you accept this offer of settlement at that time?

A No, I don't think so.

Q Did you at that time express an opinion to Mr. Nordheim as to Textura's ability to perform a settlement based upon the conditions set forth in these notes?

A You mean paying him $25,000 August, $25,000 September and $16,000 in October?

Q Yes.

A Well, by July --

Q Did you express an opinion?

A I told him I couldn't do it.

Q Could you repeat that?

A I told Mr. Nordheim there was no way we could pay $25,000 in August, $25,000 in September and $16,000 in October. That would be $66,000.

Q At this point, Mr. Powrie, to your knowledge did Mr. Nordheim change these terms?

MR. TOPKIS: Your Honor, do we have to go through all this? There is no question that ultimately they struck a deal. So they changed it. We spent this whole morning on these discussions which involved only Clark-Schwebel and Textura. My client's name has not even been mentioned all morning. It has been two and a half hours.

and surface on the other side. We would have to get started somewhere. To talk about it was difficult. So I think perhaps in most cases when we ordered a weave style we would use some sample, perhaps made out of another fabric, a fabric made of non-fiber glass yarns.

When we arrived at what he and I thought I wanted he would place the order back in New York and they would weave samples and send them to me for approval. I'm talking about unfinished greige goods samples. These either hit the mark and sometimes they didn't and sometimes both of us would be surprised by the way they turned out. The process was elimination to get what I wanted. We usually talked in these conversations about, the ends and pics, that is, the count of the vertical yarns and the horizontal yarns, and we would say, "Take a few off here, put a few on there."

Anway, we wound up that something that we would approve by way of samples from their sample looms in New York.

Q Did you have any understanding with Burlington concerning your exclusive right to the styles that you developed?

A Well, we were offered and expected and received confinement.

Q What does confinement mean, Mr. Powrie?

A Well, that means that if the weaving of a certain style was undertaken for us that they would not weave it for someone else. There was an area of weave styles all over the market. I'm not talking about those. We attempted, as did Ben Rose and Qual-Fab and Thortel to make a unique weave, a weave that would have a unique appearance, at least, and we would call them our own and the mills would protect us on that. There was agreement that whatever we wove any one of the three defendants would protect us. There would be confinement. That fabric would be confined to us. They would not sell it to others.

Q Was that agreement generally observed in the industry?

A I believe it was. In my industry, in the fiber glass industry, I believe so. That is, Ben Rose told me what he had and I told him what I had, and we were offered confinement, that is, the people in our business.

Q Was that agreement ever put in writing?

A No.

Q Was it an oral understanding then between Textura and the defendants?

A It was never put in writing. It was an accepted

practice, I believe you could call it, rather than any sit-down agreement, whether oral or written, but everybody knew it existed. I remember writing and asking to confine this to us that we were putting in a big building, and it was observed.

Q Now, Mr. Powrie, concerning your relationship with Burlington Industries could you describe briefly for the Court and jury whether you experienced quality difficulties with fabrics furnished by Burlington Industries?

A Yes, throughout our history, which was one of the longest with Burlington we had quality problems as a continuing on-going thing. It was part of the world we lived in, and we lived with it.

Q Was there some percentage loss that you calculated that was a livable working loss regarding quality problems with glass fiber fabrics?

A We had the notion that if we had to we could live with about a 5 per cent loss over all -- that is just an estimate -- with these quality problems. We would get good fabric for a long time and all of a sudden we would really get a few shipments of very bad things. But I would think in answer to that question we could perhaps work with a 5 per cent loss.

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is not getting evidence in backwards and every which way. I don't like to say to the jury, "This is what happened," and try and condense what is going on. It's not up to me to do it but it's my duty to see that we don't have total confusion here.

(Proceedings continued in open court with the jury in the box.)

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MALCOLM G. POWRIE, resumed.

DIRECT EXAMINATION (Continued)

BY MR. BURGESS:

Q Mr. Powrie, before the break we were discussing the fabrics Crown and Satin Boucle. I would like you to discuss very briefly and tell the jury very, very briefly about when you developed these fabrics with Burlington Industries, Incorporated?

A We developed Crown at the time that the Crown-Zellerbach Building in San Francisco was being constructed, and we worked up a special fabric to suit their engineer's need for sun control. That was an all glass constructed building. That probably was in 1962 that we installed that. So we had Crown in our line from 1962 to 1966.

Q Over the subsequent years that you ordered this fabric, was it a particular item in your line?

A Well, Crown was our biggest seller from any source.

Satin Boucle and Crown, as far as Burlington was concerned, were the two fabrics. Satin Boucle was even older than Crown. One was ten years old and the other was eight years old, but they were standard fabrics that we had woven and sold for very, very many years and were the backbone of our business with Hess-Goldsmith.

Q Did you have any problem with quality that you could not live with with these two fabrics prior to January of 1966?

A No. Problems came and went, but they were manageable and they were adjusted to our satisfaction by Burlington.

Q Whom did you speak with when you made these adjustments regarding these fabrics? Which person?

A Paul Erskine.

Q Who was Paul Erskine? Could you identify him for the jury?

A He was Burlington's West Coast representative in the early days and later continued to represent them, but he had his own company.

Q What was that company's name?

A Erskine-Johns & Company.

Q What was the relationship of Textura to Erskins-Johns?

A He represented Burlington to us and we ordered our fabrics through him and consulted with him about our problems if we had any, and the whole relationship with Burlington started with Paul Erskine. When it couldn't be handled with Paul, then we would have to talk to somebody in New York.

Q When you placed orders with Mr. Erskine, what physically did you do?

A I might call him up, and if it was an existing weave or a running line --

Q No, on a new weave?

A On a new weave we would sit down and work it out like I described before lunch.

Q Would you enter into a written agreement at that time or would you just simply discuss it with him verbally?

A There were no written agreements at that time for the reason we had to send them samples and all that, to New York, for sample weaving. They didn't write a contract, until I approved and accepted the sample weaving. But they had a pre-production number they gave these items. So we used those numbers until a production number was assigned, when I approved the sample and they began a production weaving.

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Q Going back to crown and satin boucle, did there come a time when you began to experience quality difficulties with these two fabrics?

A We had dome severe problems about the end of 1965, and again in February, and some spotty problems up until June, that required frequent meetings with Mr. Erskine. They were unusual in their severity and their effect on our company. In fact, they got to the point where we both discussed there must be another way to sell fabrics to me, and I proposed to Paul that what they ought to do, so that I could run my company knowing what I was receiving would be usable -- because if I ordered 5000 yards and thought I was getting 500 yards of usable quality I would get ready for the goods and when they arrived, if we found there were defects in them, we had the lag time of going back for more fabrics and inspecting and it upset our schedules, and we were tied to schedules because we were working as subcontractors under general contractors and they didn't have understanding or patience with people who didn't perform as subcontractor.

Q Briefly tell the jury what were the quality problems with these two fabrics that occurred in 1966.

A Well, crown had -- the quality problems in

all fabrics was pretty much the same unless it was an inherent problem, like Spartan. It was misweaves, holes, banding, and the usual problems.

Q You testified, I believe, that there came a time when you had a discussion with Mr. Erskine concerning a proposal as to how Burlington and Textura could best mutually solve this problem.

A Yes. In April or May of 1966 we were at the point where it looked like -- and he was in agreement with me -- we had to have a different way of grading at the mill end, or a different way of delivering goods.

Hess-Goldsmith had a very complicated inspection system. They had four different levels of grades, and nobody pretended, including Mr. Erskine, to undertaand what those grades meant. Then they had a final one that was 4X, unmerchantable. That meant it was junk, I guess. I am just trying to describe their grading system. It was very complicated and meant nothing to us because you could either use the goods because there was sufficient quality or there wasn't.

THE COURT: Whose grading system was this?

THE WITNESS: Hess-Goldsmith's.

A So we would be in a discussion of those

grading systems and it got nothing we could handle.

I told Mr. Erskine the idea that I had that they hold all the usable quality -- I mean they ship me only usable quality goods and keep in their hands at their warehouses at the inspection goods that they were seconds or lower. Then the second step was that we could at a given time, when some of these accumulated -- I could go where they were and together we would make an adjustment of their quality, because we were doing otherwise, so that I could be protected and do my business knowing I had an even flow of business.

This made sense to me and Paul Erskine too, but he said he couldn't make that decision.

Q Mr. Powrie, when did these discussions occur, roughly?

A April-May, 1966.

Q You testified, I believe, that the relationship was that they would accumulate firsts and send them and keep seconds and then send them at a later date.

A That's what I was asking them to do. That's what they were not doing. We couldn't work with not knowing what quality we were going to receive. We were always behind the gun to get these things in at the building window, and there were penalties involved,

and these contractors are pretty tough guys, so if we thought we were going to receive it, if we notified by the mill we were to receive 5000 yards and we got 5000 yards but there was a big quality problem --

THE COURT: That is word for word repetition.

THE WITNESS: I am sorry.

MR. BURGESS: At this point I would like to offer in evidence Plaintiff's Exhibits 98, 103 and 115.

Plaintiffs' Exhibit 98 for identification is contract No. 7653 between Textura, Ltd. and Hess-Goldsmith & Company for 25,000 yards of Style 6011/48.

Plaintiffs' Exhibit 103 is a contract between Hess-Goldsmith & Company and Textura, Ltd. for 15,000 yards of Style 94622/41-1/2.

Plaintiff's Exhibit 115 is a contract between Textura, Ltd. and Hess-Goldsmith & Company for 30,000 yards of Style 6011/48.

MR. HARDISON: No objection.

THE COURT: Received in evidence.

(Plaintiffs' Exhibits 98, 103 and 115 were received in evidence.)

Q Could you identify those contracts for the

A And Exhibit 3 is the combination of satin boucle and crown doing the same thing, showing it by the month and by the year from 1959 through 1966.

Exhibit 4 is all fabrics from Burlington from January, 1959 through 1966 by the month and by the year.

MR. BURGESS: Mr. Hardison, with that stipulation we would stipulate that that document is accurate and offer it in evidence.

MR. HARDISON: No objection.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 829 was received in evidence.)

xx Q Now, Mr. Powrie, skipping over your meeting with Mr. Erskine in May and proceeding into June -- excuse me; when was the next discussions that you had with Burlington concerning the problems of crown and satin boucle?

A I think I said I had been discussing it with Erskine in April or May if my suggestion of how to ship crown was going to be instituted, and he said he would have to discuss it with the officers in New York of Burlington.

Q Did that in fact take place?

A Yes.

Q When did that occur?

A We met with Burlington's people in New York on June 2nd.

Q Could you tell who was present at that meeting?

A I was there, and Paul Erskine was there. Lud Vollers, who was one of the officers of Burlington, was there. He was in charge, I think. He was either president or executive vice president. At least he was in charge of this meeting.

There was a Frank Buck, who was their technical man, and I think perhaps Sam Hess was there. He may have been not there all the time, but the salesman who handled the account for the New York office was Paul Notzenbecker, and he was there.

MR. HARDISON: Excuse the interruption, but I don't think it was Notzenbecker.

THE WITNESS: No, Notzenbecker was with Stevens.

Q Let's just stick to this meeting and get the personnel who were at it and what was said.

A I am confused about the name of the person who was the New York salesman, but he was there too.

Well, the meeting revolved around a review of the quality problems on crown and satin boucle, the harm it was doing our company, my complaints about the whole thing, and it was the quality that we had been receiving and specific instances of it were illustrated and talked about.

The problem that Hess raised, I think as I recall from their side, was that we were finishing the goods and that made it more difficult for them to inspect it.

THE COURT: Were you finishing the goods?

THE WITNESS: Yes, for the most part, with some exceptions. The bulk of it was being finished by ourselves, by Menardi & Company, and that, they said, caused them a problem because they said it is more difficult to inspect unfinished goods than finished, and I go along with that. We tried both ourselves.

A We told them that to have to finish them in the East would be a real problem to us because to finish with one of the weavers required long runs, as they called them. I think they had a limit of 3000 yards was preferred. I think on occasion they would finish a thousand, but we could finish at Menardi and could in much shorter tuns. And if we needed some

greige goods finished in a particular color for our warehouse, what we had for stock for short orders, it was to our advantage on certain colors and certain weaves to finish shorter than we could get from the East. So it was a big disadvantage, as far as we were concerned. I explained that to them, but I didn't say we wouldn't agree to it, because we were trying to solve our problem together.

THE COURT: I think you said that it was more difficult to examine and inspect unfinished than finished; is that what you said?

THE WITNESS: Yes.

BY MR. BURGESS:

Q Mr. Powrie, incidentally, did any person from Burlington or Erskine-Johns Company ever acknowledge to you that these goods were in fact bad quality?

A Oh, yes, they made their adjustments on it. I had no problem and no quarrel with them about making adjustments up to this point.

Q Could you continue with what happened at the June 2nd meeting?

A The proposal that I thought would solve my problem best was offered to them, and that, to repeat myself, was to suggest that in their inspection of the

goods, finished or unfinished, that they send me first quality, I'll pay for first quality, and would receive their shipments knowing I could use them all, which would be great convenience to our company -- or, rather, the other way around, it wouldn't be an inconvenience.

So that was discussed. They didn't know quite how they could handle that, and there was a good deal of discussion about it, and the whole plan, again, was to send me good stuff and then I could inspect the seconds that they would accumulate and we would agree to apprise on them, and I would have them shipped out.

This plan was not accepted in that nothing definitive was arrived at at the meeting in that Jim Buck was going to come out, their technical man was going to come out to Los Angeles, and see our finishing plant and see our problem with some of the goods, and that sort of thing. He didn't arrive, however.

But the upshot of the meeting was we both had discussed the problem that we felt was a mutual one. We both had an interest, and said so, in continuing these weaves and serving me better, and I of course told them I couldn't do better without these two weaves. But it wasn't a conclusive meeting. We left it to be decided after Jim or Jack Buck, whatever

his name was, came West and could see things for himself.

Q When was he to come West, according to this meeting?

A They said in about two weeks.

Q The date of this meeting was June 2nd?

A Yes.

Q Up to that time -- and I just ask you to refresh your recollection by reference to the exhibit that was recently marked -- how had the deliveries of crown been going?

A Well, we had been buying more than ever. Using Mr. Hardison's figures, through July of 1966 we had bought 66,000 yards. After that we were only able to get less than 3000.

Q But up until that time, up until approximately the time we are discussing, June and July of 1966, you were delivered 66,000 yards of goods?

A The figures, January through July, total 66,000 yards.

Q Could you repeat for the jury's sake the date on the contract number 7881, which I believe is Plaintiffs' --

A That's 11[illegible]

Q -- Plaintiffs' 115 in evidence?

A The date is 4/19/66.

Q For how many yards of crown was that?

A Thirty thousand.

Q What were your needs for this fabric at this time?

A We were screaming for it. Mr. Erskine was doing everything he could --

THE COURT: Screaming for what?

THE WITNESS: For crown, for deliveries.

THE COURT: What were your needs for them, was the question, for what building, what particular venture.

A Our needs were for agout 100,000 yards more.

THE COURT: I still don't know what it was for.

THE WITNESS: To install on contracts in which it was specified.

Q Mr. Powrie, subsequent to June 2nd, when was the next occasion that you discussed the matter of crown with anyone from Burlington or Erskine-Johns?

A Subsequent to June 2nd?

Q Do you have an independent recollection. If you don't, I can hand you a document to refresh your

(Plaintiffs' Exhibit 830 was received in evidence.)

Q Could you identify this document, Mr. Powrie?

A These are my notes on a phone call from Paul Erskine, June 13, whereir he was reviewing styles ordered from Burlington.

Q Mr. Powrie, does that refresh your recollection as to a conversation with Mr. Erskine on or about June 13? Incidentally, did anything happen in between June 2 and June 13?

A Clark-Schwebel had put us in arbitration.

Q What did Mr. Erskine say to you in the telephone call of June 13 with respect to the fabric Crown?

MR. TOPKIS: Could we have the whole conversation, your Honor, once and for all?

MR. BURGESS: Agreed.

Q The entire conversation.

A Paul called and reviewed with me what I had ordered with Burlington, which was something he did on occasion, and these notes are my notes on what he told me with respect to Crown and Contract 7881, which is the one for 30,000 yards, dated April 19. He said it had been canceled.

Q Now --

THE COURT: Mr. Hardison, you have no objection?

MR. HARDISON: No objection, no.

THE COURT: You don't acknowledge the truth of what is hearsay?

MR. HARDISON: That was my only question.

MR. BURGESS: I would like to read this.

(Mr. Burgess reads from Plaintiffs' Exhibit 125 in evidence to the jury.)

BY MR. BURGESS:

Q Mr. Powrie, subsequent to your telephone conversation with Mr. Erskine did you have occasion to contact anyone else in the Burlington organization with respect to the matter of Crown?

A With respect to Crown I did. I called Mr. Vollers on the 22nd of June.

Q What did you say to him and what did he say to you?

A I was inquiring about where we stood as far as the conference we had had on June 2nd. I was inquiring about whether they could work with that proposal I had made, and he told me no, that they would have to deliver the goods according to the terms of the contract.

Q Mr. Powrie, I'm sorry, but you're speaking to me and I'm asking the questions, and if you will just repeat

that last answer to the jury. I don't think they heard it.

A He said that he could not, that Hess-Goldsmith would not or could not pick up the suggestion I had made, which was to ship us only first quality goods and keep the second for inspection and purchase later, that they would have to deliver according to the terms of their contract. We discussed other subjects, but that was on the point of Crown.

I asked him about what Paul Erskine had told me, about the fact that the contract had been canceled on Crown, and he didn't say it had been, but he made the remark that he would turn the tap on on that.

Q Following July of 1966 did your deliveries of the fabric Crown tail off? What happened to your deliveries of the fabric Crown?

A They substantially ceased.

Q Could you read the bottom line of Plaintiffs' Exhibit 829, and I refer you to the first page, the bottom line starting with 1966.

Read that through to December, identifying by month, please?

A This is Burlington's records of shipments to us on the style. We have the style Crown and it indicates that in January they shipped 8176, February, 5410; March,

4882, April, 14662; May, 11240; June, 10886; July, 11009.

Q Did you make a calculation --

MR. TOPKIS: Could the witness for once finish his answer to the question?

THE WITNESS: I did answer it.

THE COURT: Is that as far as it goes?

MR. TOPKIS: That is what I want him to do, to finish without being interrupted all the time.

THE WITNESS: I thought you asked me for the deliveries through July, and that is what I answered.

Q What was the cumulative total of that? Did you add those?

A It appears to be 66,265.

Q Now, would you read the deliveries listed for the months subsequent to July of 1966?

A August, zero; September, zero; October, 79 yards; November, 2848; December, zero.

Q Did you make a total of those figures?

A I didn't, but I can. That is 2900.

Q We will accept that.

A About 3000 yards.

Q Now, Mr. Powrie, had your needs for Crown, had Textura's needs for Crown diminished at all during those

subsequent months?

A Not at all. We had a great need for it.

Q Incidentally, Mr. Powrie, there has been talk here this morning of the settlement of your arbitration with Clark-Schwebel.

What was the date of that settlement?

A July 29, 1966.

Q Mr. Powrie, going back in time a little, you testified this morning that on April 27, 1966, Mr. Schwebel and Mr. Nordheim had asked for a guarantee of your account with Clark-Schwebel?

A Yes.

Q Did you thereafter receive a demand for a guarantee of your account from Burlington Industries?

A Yes, the day I returned to Los Angeles Jack Cann, their Los Angeles credit man, called me and asked me for a personal guarantee, and on May 3rd I received one in the mail from him for signature.

MR. BURGESS: I offer Plaintiffs' Exhibit 117 in evidence.

THE COURT: What is it?

MR. BURGESS: It's a letter dated May 3, 1966, to M. G. Powrie from Burlington Industries, Jack Cann, enclosing a typed form of Burlington Industries.

MR. HARDISON: No objection.

(Plaintiffs' Exhibit 117 was received in evidence.)

xx Q Mr. Powrie, did you execute that guarantee?

A No.

Q Why not?

MR. HARDISON: Objection.

THE COURT: Sustained.

Q Mr. Powrie, you testified this morning when exhibits were introduced which speak for themselves concerning the attempt of Textura to place an order with Clark-Schwebel for the fabric Morro, did there come a time when yo9u approached anyone from Burlington Industries or Erskine-Johns Company concerning the weaving of this fabric, Morro, by Burlington?

A Yes.

Q Is there a document which would refresh your recollection? Could you please tell us whom you approached?

A I placed that order with Paul Erskine.

Q Do you know of your own independent recollection the approximate date that you placed that order?

MR. TOPKIS: Isn't the order the best evidence?

MR. BURGESS: If I might be permitted a few question.

I will establish that it involved placing a verbal order.

MR. TOPKIS: I have no objection.

Q Do you remember the date approximately that you placed that order?

A It was about the middle of May.

Q Did place any other orders at that time?

A Yes, there were a half dozen fabrics, a new line, as we call it, that was placed with Paul Erskine at that time. There must have been in addition to Morro, maybe four or five others. They were all new to our line. Morro was the exception.

Q Incidentally, Mr. Powrie, with the exception of Morro were contracts ultimately entered into with Burlington Industries on this new line?

A Burlington accepted an order on Morro, as well as the other.

MR. TOPKIS: Could we have an answer to the question?

THE COURT: Yes.

MR. TOPKIS: The answer is yes?

THE COURT: I don't know. Maybe we ought to read it back.

(Answer read.)

THE COURT: I would interpret the answer is yes. Is that correct?

THE WITNESS: Yes.

Q Now, were these orders assigned pre-production numbers?

A I am sure they were. That was the arrangement that we worked with Hess-Goldsmith.

Q I would like to hand you this document and ask you to identify it?

A These are my notes taken on the day that I met with Paul Erskine, which apparently is the 11th of May, 1966, and ordered six fabrics from Hess-Goldsmith.

Q Would you read the names of those fabrics, pleawse?

A New Vista, A-3418;

New Morro, A-3439;

Glacier, B-3328-48;

Shag, A-3211;

High Rise, A-3232;

Homespun, A-3236.

Q Now, was the new Morro referred to in that document the same fabric as the Morro which Clark-Schwebel had refused to weave for you?

A It was identical.

Q When was the next time you subsequently heard from anyone in the Burlington organization with respect to the fabric Morro?

A Well, that was on June 13, when Paul Erskine came to the office and we reviewed those various contracts, including Crown that I have testified to. I inquired about Norro and he said he had not an answer on that. So I called Vollers.

Q Could you speak up and speak a little more slowly?

A I called Mr. Vollers again on the same date as I called him about the cancelation of the Crown contract, which was June 22, and I asked him about Morro, weren't they proceeding with the weaving of it. He didn't directly answer. He was going to let me know. I can't recall the language. But it was not a statement yes or no. He was going to advise, so to speak.

Q Did he subsequently advise you?

A No, he didn't. They never did weave it.

Q Could you repeat that answer?

A They never did weave the fabric.

Q Did there come a time when you approached any officer of the defendant J. P. Stevens concerning the weaving of the fabric Morro?

A I am not sure I approached an officer, unless John

Wilson and Paul Motzenbecker are officers. I think Wilson is.

Q Did you approach any personnel from the defendant J. P. Stevens?

A For sure I approached Paul Motzenbecker. He was our sales representative for Stevens. He was the man that I would deal with. That means that I didn't also talk to Wilson, but I have a clear recollection talking to Paul Motzenbecker and I gave him a piece of Morro.

MR. TOPKIS: Could we know when this was?

THE WITNESS: This was in July, 1966. I was in New York, I recall, for a week and went and placed this order with Stevens. Three day or two days later I got a call from Paul Motzenbecker and he asked me to have lunch, and at lunch he explained that Stevens would not weave Morro for me, and I wanted to know why, and he explained it was too difficult.

Q Did he give you any explanation of why it was too difficult?

A Well, I recall he had a pencil and he was putting a design on a napkin he was calling Morro, on a back-to-back lino. Morro was a lino weave, and I didn't know the term back-to-back lino, but he drew a diagram on the napkin and said that J. P. Stevens found not too difficult to

weave.

Q Did you believe that --

MR. TOPKIS: Objection.

Q Did Burlington ever give you a reason for not weaving Morro?

A No, I got bogged down in the quality problems. My interest was more in preserving Crown and it kind of faded out of the picture. They never did weave anything for me outside of the number given to me for a little sample. I never got any more.

MR. BURGESS: May we take a recess at this point?

THE COURT: Yes.

(Short recess.)

Q Mr. Powrie, referring to Plaintiffs' Exhibit 829, the chart of the deliveries of crown and satin boucle, would you tell me how many yards you had on order according to that chart in 19 --

MR. HARDISON: Objection. The chart doesn't show that.

A The chart doesn't show. It is their deliveries.

Q Can you testify from your own recollection how many yards you had on order?

A Yes. We had 80,000 yards.

MR. HARDISON: What date was this?

MR. BURGESS: 1966.

A For the year 1966 we had contracts that called for 80,000 yards.

Q Referring to that chart again, and the deliveries of crown and satin boucle subsequent to July of 1966, and subsequent to the date of the settlement of your arbitration with Clark-Schwebel, could you tell the jury what was the -- do you know of your own recollection what was the usable quality on those goods?

MR. TOPKIS: What goods?

MR. BURGESS: The goods of satin boucle and crown.

A They were unusable. I know, because we had two large jobs in Chicago in the American Dental Association Building and Loyola University, and I couldn't get any usable quality of either crown or satin boucle which the owner was willing to accept out of any of these shipments after July.

Q Mr. Powrie, are you familiar -- do you know a person by the name of Mr. Irwin Schutz?

A Irwin Schutz is head of the credit -- or he was; I think he is dead now, but I think he was head of the credit division for Burlington Industries.

Q When was the first time you met Mr. Schutz?

A I don't think I know. I might have met him prior to April, '66, but I am not certain. I dealt with the sales division of Burlington Industries, not with the credit department.

Q Did you come to have discussions with any personnel from Burlington Industries in June or July of 1966, or at any time prior to that, concerning your dispute with Clark-Schwebel?

A I talked to Mr. Schutz and Mr. -- and Bob Knisel in July. In fact, I was in New York because I was required to be there by Mr. Knisel.

Q I wish you would clarify that for the jury.

The question I asked related to personnel from Burlington Industries. Who is Mr. Knisel?

A Mr.Knisel, the credit manager for J. P. Stevens.

Q You can answer the question any way you wish, but please identify who these persons are for the jury.

THE COURT: Mr. Schutz, was he not with Burlington?

MR. BURLINGTON: Yes.

THE WITNESS: He was head of the credit department for Burlington.

THE COURT: You talked to him in July?

THE WITNESS: Yes, I talked to him but it was incidental to being asked to come by Mr. Knisel in July, who was credit manager of J. P. Stevens as far as my account was concerned.

Q When did you have these conversations with Mr. Schutz?

A I don't know exactly but it would be the week of July 27th, on that side of that date, I think, somewhere in there.

Q Can you tell me what he said to you and what you said to him?

A What Mr. Schutz said?

Q Mr. Schutz,

A I don't think I went to see him by any pre-arrangement on leaving Los Angeles, but I had been to see Mr.Knisel, and I was there to talk to Mr. Schutz about my problems on not getting any fabric, and the quality of it.

Q Could you speak up, Mr. Powrie?

A I'm t ing to reconstruct the conversation, and I am not sure that I can. I am trying to remember who was there. I am not certain but what Mr. Kelley. was there.

In any event, I told him I was in town on general business and to see Stevens and Hess-Goldsmith and themselves, as I usually did. He asked me about my quarrel with Clark-Schwebel.

Q What was the status of that quarrel at that time?

A At that time we were about to close out the arbitration problems with a meeting with Clark-Schwebel at, I think, the end of that week.

Q So there had been a meeting scheduled with Clark-Schwebel at that time?

A Yes.

Q When was it scheduled for?

A The meeting was scheduled for a Friday, the 29th of July, so I met with him some day preceding during the week. With Mr. Schutz, I mean to say. I met with Mr. Schutz prior to the 29th.

Q At that time --

THE COURT: Wait a minute. I am trying to get the dates. The meeting to settle whatever it was with respect to the arbitration was July 29th?

MR. BURGESS: The meeting I believe at which the settlement was reached was July 29th, and the settlement paper is dated some days later.

Your Honor, I think this would be an appropriate time to offer in evidence the settlement agreement entered into July 29th at the St. Regis Hotel.

THE COURT: I agree.

MR. MC GAINEY: We will supply a clean copy to substitute for this one tomorrow.

MR. BURGESS: This is a letter agreement dated August 4, 1966, addressed to Textura, Ltd., attention Mr. Mal G. Powrie, President, and signed "Cordially, Clark-Schwebel Fiber Glass Corporation, J. P. Schwebel, President."

I ask that it be marked Plaintiffs' Exhibit 166, and ask that it be received in evidence.

MR. MC GANNEY: No objection.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 166 received in evidence.)

THE COURT: Are the pencil notations part of the exhibit?

MR. BURGESS: No, they are not, and that's why we are submitting a clean copy to him.

THE COURT: All right. I will wait for the clean copy.

MR. BURGESS: I wonder if I could at this point read this agreement to the jury. I will not read the markings on it, just the printed text.

THE WITNESS: Pardon me, but I was in the middle of testifying about what Mr. Schutz and I talked about.

BY MR. BURGESS:

Q Very well, Mr. Powrie.

A Do you want to finish that?

Q Why not.

A Well, the substance of it was after hearing about my quality complaints, that I was to settle with Clark subsequently, in substance -- I don't remember the exact words -- or we would be shut off.

Q At this time, Mr. Powrie --

MR. TOPKIS: Is that all of the conversation now? Are we done with it? I don't want Mr. Powrie to come back again and tell us there was something else he wanted to tell us.

THE WITNESS: That's the substance of it.

THE COURT: If you remember anything else, I suggest you tell us now. Those were his express words, I take it?

THE WITNESS: I don't think they were his express words, but that was the conclusion I drew from what he said. That was in substance --

THE COURT: Do you remember what he said?

THE WITNESS: He said it more subtly than that. He said something to the effect that "Well, of course, Mr. Powrie, I don't believe we can entertain further open account with our company and yours unless and until you settle with Clark-Schwebel."

That would be closer to the verbiage, although I still don't think that is exactly a direct quote.

THE COURT: All right. Thank you very much.

BY MR. BURGESS:

Q Mr. Powrie, you testified at the time you

ton --

Q May I ask you --

MR. TOPKIS: May the witness be allowed to finish?

MR. BURGESS: I stand corrected --

A -- Burlington or Stevens had asked for a personal guarantee but it was in passing, it wasn't connected with anything, it was in my judgment a credit man's interest to get guarantees. I am not sure of what I am saying, because I can't say positively they had never asked me for a personal guarantee but I don't remember any.

Q In 1966 had they ever asked you for a personal guarantee prior to that one?

A No, no, they had not asked me for a personal guarantee for a number of years anyway.

Q Did you have any reason to expect them to ask you for a percentage guarantee in 1966?

A None whatever.

Q In that year prior to that time had they ever mentioned anything about setting a limitation on your credit?

A Again, I am not sure, but I didn't deal with J. P. Stevens knowingly with any credit ceiling.

THE COURT: Sustained.

A I was reading my own mind in that case.

MR. TOPKIS: Yes, I know.

THE COURT: That's the trouble with it: impugning to another man what your thoughts were.

Q Mr. Powrie, let me ask you this. Did Mr. Knisel indicate anything in his conversation that would indicate to you that these requests were somehow related to your dispute with Clark-Schwebel?

MR. TOPKIS: Objection, your Honor.

THE COURT: What did he say? We can have specific conversations.

MR. TOPKIS: That is all I am asking.

MR. BURGESS: That is all I was asking.

A That was the whole subject matter.

THE COURT: Not the subject matter, what were the words? What was said?

THE WITNESS: He asked me all about the Clark-Schwebel problems, and I told him all about them, and --

THE COURT: What else did he say?

THE WITNESS: He asked me for a personal guarantee because of the Clark-Schwebel problems.

THE COURT: He said it was because of the

Clark-Schwebel problems?

THE WITNESS: Yes. He said he was putting a limit on my account of 20,000, that --

THE COURT: And he specifically stated that it was due to the Clark-Schwebel controversy, in so many words at this time?

THE WITNESS: Did he say what, sir?

THE COURT: Did he in so many words say that he was putting the limit on your credit and requiring a guarantee because of the Clark-Schwebel controversy?

THE WITNESS: Yes.

Q Did there come a time subsequent to this that you had a meeting with Mr. Schwebel and Mr. Nordheim at the St. Regis Hotel?

A Yes.

Q Who was present? What was the date of that meeting, first?

A That was the same week. It was 29th of July.

Q Who was present at that meeting?

A Jack P. Schwebel, Raymond P. Nordheim, I was, and Mr. Grafstrom were. We met in Mr. Grafstrom's room at the St. Regis Hotel.

BY MR. BURGESS:

Q Mr. Powrie, could you tell me, again, restating my first question, what was said at the meeting concerning the settlement of the Clark-Schwebel arbitration by the parties?

A They were going to issue a credit, I think it was $12,000, if we signed an agreement to pay them $10,000 a month every two weeks.

Further, they demanded that we weave into some fabric which we mutually accept -- was mutually acceptable from the yarn that was not used to weave the Civic that we had the problems with. This contract says we are to pay $70,000 at $23,500 for September, October, and November.

Q Does that --

A So I am thinking, when I was trying to remember I was thinking about something we talked about but it didn't work out that way, apparently.

Anyway, this requires $70,000 paid in non-interest-bearing notes, it says here.

Q Who said that? Who was discussing the terms with you on behalf of Clark-Schwebel Fiber Glass Corporation?

A Both Mr. Nordheim and Mr. Schwebel.

Q And what did you say to them?

A About --

Q Let me ask you, first of all -- let me ask you, first of all, Mr. Powrie, were these terms any more satisfactory to you than the terms which Mr. Nordheim had discussed with you on July 6th?

MR. TOPKIS: Objection.

THE COURT: I will sustain the objection. They are different, aren't they, than the ones discussed previously?

THE WITNESS: They were a little different. Not substantially, no.

THE COURT: But more favorable, would you say, than the prior terms?

THE WITNESS: In the amount of the credit they were thinking of giving us. I think the other was -- my notes on one of the conversations was $6900 and I think this came to $12,000, although I would have to check it.

A I said a lot of things. I said the offering of a credit, especially to give us a credit only after we paid for all this junk they had in their warehouse -- I must have said that, I know I did -- this was nothing; any man that was in a position who could act independently would not sign; I had to sign because of the pressure on me from three sides. I'm sure we argued about all these points. They didn't make any sense at all. It gave them cash for all the junk they had and then they would give me 12,500.

Q Incidentally, you talked about pressure from the other sides?

MR. TOPKIS: Could I hear that question?

Could I have that expression read back again, please?

THE COURT: Read the answer.

MR. TOPKIS: Is there any reason to read the answer back?

(Answer read.)

Q Is that the substance of everything you said to Mr. Nordheim and Mr. Schwebel?

A I'm sure it't not. I don't think I can reconstruct that meeting, four of us talking at once. I remember, though, when we understood what they were demanding, Mr. Grafstrom and I went to his room in the hotel -- we went in

a different room and we sat there and talked to each other about this thing and we decided we had to sign it, so we did.

Q Why did you feel you had to sign the agreement?

MR. TOPKIS: Objection.

MR. BURGESS: I think that is very relevant.

THE COURT: He has already said because he was under this pressure.

MR. BURGESS: I don't think he has identified who the other three were, your Honor?

THE COURT: Ask him who the other three were.

Q When you said you were under pressure from the other three --

MR. TOPKIS: I believe he said he was under pressure from three sides.

A Well, one side was Clark-Schwebel, and the other side was Mr. Knisel of J. P. Stevens, and Mr. Schutz, Burlington Industries. I had just come from them during that week. I knew what their position was.

Q Mr. Powrie, did you make any expression to Mr. Nordheim or Mr. Schwebel concerning the capacity of Textura to perform on the terms that they demanded?

A I told them we couldn't do it. By this time our company was in drastic condition. We could not do

it, is the answer.

Q Why couldn't you do it, Mr. Powrie?

MR. TOPKIS: Objection.

THE COURT: Sustained.

MR. BURGESS: At this time, your Honor, I would like to read this agreement in evidence, Plaintiffs' Exhibit 166.

THE COURT: It could be shown to the jury. There is such a thing as showing a document to the jury.

MR. BURGESS: I will simply supply copies tomorrow.

THE COURT: It takes an awful long time to read documents.

MR. BURGESS: Your Honor, I am in a sort of logical breaking place.

THE COURT: Well, I am not.

Q Mr. Powrie, subsequent to the date of the Clark-Schwebel settlement on July 29, 1966, did you have any further discussion with Mr. Schutz of Burlington Industries?

A Yes. He told me to come back and see him after I settled with Clark-Schwebel, and I don't remember the reason, but I did not. Well, I know why, it was Friday the 29th and I couldn't go back and see him. The meeting at the St. Regis Hotel was Friday, the 29th. So I didn't

go back to see him; I went back to Los Angeles by way of Dallas where we had work going and called him from Dallas. Probably it would be the 1st or 2nd of August, 1966.

Q What did you say to him and what did he say to you?

A Well, the only purpose of calling him was to tell him I would sign the agreement, which is what he wanted me to call him and contact him about, and I reported that I had seen the signed agreement with Clark-Schwebel. He said, "Yes, I know."

I said, "Well, that relieves me of your demand for a personal guarantee," which he had said in his meeting with me, prior to the St. Regis meeting, that he would release me from that request if I did sign with Clark-Schwebel, and he said, "No, I still want it."

Q Did you subsequently give him that guarantee?

A No, sir.

Q Did you have subsequent conversations with Mr. Schutz concerning any of the contracts then existing between yourself and Burlington?

A Yes. He in a sense took over at this time. I was no longer dealing, that is, with Mr. Vollers, and he took over the problems, and I remember he called me in

August, about the middle, I would think, and discussed the whole problem with me, and later on that month he sent me modification forms on a number of our contracts to change their terms.

On the Crown, I remember, he reduced the last contract we had with him for 30,000 yards, which would be that 7887, from 30,000 yards to 20, and he canceled out 9700 yards of the contract preceding it. That is, he sent me these forms to do so, and he changed the delivery terms so that I substantially would not receive any material until the end of that year.

MR. TOPKIS: This was done by writing, your Honor? I submit this writing is the best evidence.

THE COURT: Are there letters?

THE WITNESS: They were called contract modifications.

THE COURT: There are no letters to support this?

MR. BURGESS: Buyer's Request for Contract Modification.

THE COURT: There are pieces of paper, I suppose, that Mr. Topkis is referring to.

MR. BURGESS: Your Honor, I have a problem with this, because --

THE COURT: Why don't we take a short recess.

(Recess.)

BY MR. BURGESS:

Q Prior to the break we were discussing, I believe, modifications on contract which you had executed with Hess-Goldsmith division of Burlington Industries.

I show you Plaintiffs' Exhibits 179 through 185, which are Hess-Goldsmith & Company forms of buyer's requests for modification of contracts. I ask that you identify those, please.

A 179 is Modification No. 28 -- or 2362 -- I can't make it out. It is dated February 10, 1966 and it cancels the balance of the contract for 12,568 yards on Satin Boucle -- pardon me; this modification date is 8-24-66.

Q What does the modification specify?

A It specifies that they are going to cancel 12,568 yards on this contract, No. 7717.

MR. TOPKIS: These documents are signed by Mr. Powrie.

MR. BURGESS: Who said they weren't?

Q Now, Mr. Powrie, did you sign such a document?

A I think I signed most of them. There were a couple I don't think I did sign on Crown. I'm not positive. But I have a feeling that I did not sign them all.

Q Were you in agreement with the modifications that those --

MR. BURGESS: I think we better have those marked in evidence, 179 through 185.

MR. TOPKIS: No objection.

(Plaintiffs' Exhibits 179 through 185, inclusive, were received in evidence.)

THE COURT: These exhibits all refer to buyer's request for modification.

THE WITNESS: Yes, that is their printed form.

MR. BURGESS: Could you speak up, please, Mr. Powrie?

THE WITNESS: I said that is their printed form.

Q Would you take those buyer's requests for contract modification.

I want to ask you both as to the ones you signed nd as to the ones you didn't sign --

MR. TOPKIS: May we know which ones exactly are signed and which are not? My copies are so badly Xeroxed I can't tell.

THE COURT: Maybe you can reach some agreement.

THE WITNESS: I don't think I can tell.

THE COURT: Do we have the originals anywhere?

MR. HARDISON: Yes, we do. We will produce

those overnight.

THE COURT: Produce those so we can tell which ones were signed and those not.

MR. BURGESS: I don't think that is relevant. I think I can still ask the question.

Q With respect both to the ones you signed and the ones you have not signed, and whatever were signed were signed, and whatever were not signed were not signed, and we won't find out until tomorrow, but were you in agreement with the modification stated on those requests fo modification?

THE COURT: Is he going to deny his signature or what? Is the witness going to be asked to deny his signature?

MR. BURGESS: No, I can make the point in the presence of the jury if Mr. Topkis would like -- I will ask you outright --

Q Why, Mr. Powrie, did you execute these buyer's requests for contract modification?

MR. TOPKIS: Objection.

A I had no choice.

Q Did you have discussions with Mr. Schutz about these requests for contract modification?

A Yes.

Q What did he say?

A He told me he was preparing them and he wanted me to sign them.

Q Did he say anything further?

A Well, our conversations with Mr. Schutz during that time included the fact that he was changing the extended terms. He wanted my bills paid on 60 days' time, if I remember at that time. He was indicating, and, in fact, not indicating, but said if I did not pay in 60 days that he would not allow delivery of any more goods; there was occasion when he said he would not deliver any goods; there was occasion when he said he would deliver goods only if I paid cash; there was another occasion he said I would have to give him a dollar and a half for every dollar in cash I gave. There was a series of conversations all following the St. Regis meeting, and he told me he was sending these.

Now, I don't think I signed all of them. I think I got my back up on Crown. If you find something signed, I signed them. I don't think I did on Crown, because I just couldn't do such a thing. Some of these are new weaves and they represent weaves that we have never seen before, never put in our line, and they are not yet ready for delivery and of less importance. On the point of

signature, I probably signed those. I think you will find I didn't sign the Crown contract, and possibly not the Satin Boucle. I don't know. But I was losing business, a lot of it over Crown, and I don't think I signed that.

Q Mr. Powrie, prior to 1966 had Burlington Industries ever charged you interest on your account?

A Yes.

Q Did there come a time when interest was listed in your account prior to 1966?

A Yes, in April, 1965, Mr. Schutz came to the West Coast and he and Mr. Donnelly, who was then their local credit man, visited me in my office. Mr. Schutz said he was seeing accounts in the West and we talked about business in general. I told him about our expansion program, how it is being consolidated. He seemed to be pleased with it all and he said, "What can we do to help you?"

And I said, "I really don't know. I think you are doing all you can now."

He said, "Well, let me just relieve you of paying any interest."

We were talking about my terms for 120 days, and he said, "Well, I will see that we don't charge you any interest during 1965."

And then he said, "Since you feel so confident about the future of your company and you have said all these things about your future, you won't feel any risk in giving me a personal guarantee?"

And I said, "No, as long as it expires in 1965."

So I don't think I signed it in his presence, but I think Mr. Donnelly brought it in the next day and I did sign a personal guarantee, although we didn't pay interest the balance of that year, I don't think so.

Q Now, did there subsequently come a time in 1966 when interest charges were reimposed on your account?

A No, I don't think I can tell you the date, but the time that is involved with these modifications was August, and I know we had been talking about 60-day terms, and I think theinterest was one-half, as they call it, it was 30-day terms plus 30 at one-half, that would be 60-day terms. You pay interest starting at the end of 30 days.

Q Now, Mr. Powrie, did you have any other communications with any personnel of Burlington with respect to the amount of credit terms extended to you prior to the time of the arbitration with Clark-Schwebel?

A Did I have discussion with other --

Q -- personnel of Burlington concerning the extended credit terms?

A I don't recall specifically.

Q Did there come a time, Mr. Powrie, when with respect to these new weaves delivery was made by Burlington pursuant to these modified contracts?

A Yes, in November, I believe, November, 1966, Paul Erskine, their representative, brought in some new weaves, I think. They were weaves, anyway -- I got to redo this --

We had ordered a fabric called Homespun in substitution of Clark-Schwebel's Homespun, or to go alongside of it, because we were having problems with it. Anyway, he brought that in and the weave was completely cockeyed. It in no way resembled what we had on our hands, that is, what we had booked and sampled and what was supposed to be matched. There were a number of things.

There was another fabric called New Vista, and we had been receiving some of that, and the color line came out all pink, I remember, in a pink tone, not acceptable in our business at all.

What else? Well, we talked about Crown in November, 1965, and he made the statement that Hess-Goldsmith would go back to working it, but they wanted more money for it. These things didn't register much in November, because we were down the tubes. Whatever it was, whatever

it was, whatever he showed me it was unacceptable, and I remember making the remark, "Well, you finally put me out of business."

MR. BURGESS: At this time I would like to turn to another subject.

Q Did there come a time in July of 1966 when Burlington discontinued any style of Crown that they made?

MR. TOPKIS: I don't understand that question.

MR. BURGESS: I will withdraw the question.

THE WITNESS: There was only one style of Crown.

Q Turning to another subject, Mr. Powrie, could you explain in connection with the expansion of your company the significance of the Movac process?

A Movac is a term applied to a process developed in Germany, I believe, and exploited in Holland by a man named Cornelius Veromi. He was a shipbuilder in Holland and made his own ships and engines, and I only mention that because he made the vacuum metallizing tanks that were needed for vacuum metallizing, and to explain that, we were in the business of controlling the sun and we had the problem or the anomaly of putting glass in walls of buildings and then having to cover it with something you couldn't see through, and architects didn't like that. They realized they had to accept it, but they didn't like that.

by Hess-Goldsmith, Division of Burlington, subsequent to the time of the St. Regis agreement?

A 14,841.

Q Now, Mr. Powrie, after the time of the St. Regis agreement were you extended any credit? Were you sold any goods on credit by the defendant Clark-Schwebel?

A No. We had been oncredit since March, and they kept us that way through the end of the year.

Q Now, Mr. Powrie, --

THE WITNESS: Did I say credit? We had been on cash since March.

Q Were you continued on cash after the time of the St. Regis agreement?

A Yes.

Q Mr. Powrie, what goods did you have on hand of Clark-Schwebel at that time to sell?

MR. TOPKIS: When is this, please?

MR. BURGESS: At the time of the St. Regis agreement.

A We didn't have anything.

Q I believe you testified already that the goods that were concerned in the St. Regis agreement, of those goods a certain portion of them represented the goods which were subject to the quality dispute. Could you tell us

what those styles were?

A Well, the styles that we couldn't use because of quality were Civic, Glacier, Spartan, Homespun to a degree, Shepard; the ones we could use are easy to enumerate.

Q Now, concerning the names of the styles mentioned on the first page of Plaintiffs' Exhibit 166, Homespun, Linweave and Civic, could you tell the jury what the status was on the Linweave weaves that are mentioned on the first page of Plaintiffs' Exhibit 166?

A Linweave was committed in two directions. It was in two different widths. The 60-inch width was to be delivered to the Republic Bank by prior agrre-ment. Republic Bank was a job in Dallas, Texas, that hadn't yet called out the balance of this. It was about 4000 yards.

The Linweave in 45 inches, which wasmore yardage -- I think this says 17,000 -- my recollection was around 12 -- but that was all committed to a job called the Demon 100 Building in San Jose, California.

The only fabric left that we had any -- could use was Homespun, and at the time of the arbitration my recollection is it was only about $8500 worth, which would be pretty close to that in yards; maybe somewhat less.

The rest was absolute junk that we had been quarreling about for 18 months, and so I was out of business as far as any fabrics from Clark-Schwebel was concerned.

process?

Did he indicate what his reasons were for not placing the orders?

MR. BURGESS: No, your Honor, he did not.

Q I would like to turn now to another subject, Mr. Powrie, and that is your relationship with a party named as a co-conspirator in this case, L. F. Dommerich & Company.

Prior to doing that, I wish that you would again, so that the jury will understand that subject, explain what is L. F. Dommerich & Company, what business is it in?

A L. F. Dommerich & Company is called a factor. They are a banking, a financial institution, that gets money in people's hands in a certain particular fashion.

Q Could you tell the jury in somewhat more detail so they will understand how a factor operates in your business?

A L. F. Dommerich & Company and Glass Fabrics & Co. formed a contract where they purchased, they didn't lend money against but they purchased our receivables; they purchased and owned them and collected on them. If there was no other problem with that invoice that we had issued that they had purchased, other than the

fact that they had the client couldn't pay, the customer couldn't pay, or his credit wasn't any good, that was on Dommerich's risk.

If they elected, in taking one of our invoices and purchasing it not to accept our customer's credit, they would then take it and give us the money for it, but it would be with recourse to us in the event they couldn't collect it for credit reasons.

Q Mr. Powrie, did there come a time that Glass Fabrics, or you acting on behalf of Glass Fabrics, sought to obtain a factor for your business?

A Yes, I think I testified that some friends of mine and I were acting in that capacity up until 1962. We decided not to go further with it for several reasons, one being that we wanted to put our funds directly in the business when the time arrived and it looked like --

MR. TOPKIS: I don't mean to interrupt, but I don't think that has anything to do with this case. There came a time he started dealing with Dommerich, that's the only thing of significance.

MR. BURGESS: I think we can proceed with that.

THE COURT: I am allowing a certain amount

textile business but which would be different in our business, and they were the type of thing that when we would issue an inovice to a general contractor to pay a bill the interest could not be charged to that contractor because that wasn't our arrangement with him, and while the contractor committed to us to pay us upon presentation of our bill there was always a lag, and Mr. Hornickel and I both understood that general contractors operate as much as they can on sub-contractors' money and they use devices, whatever they can legitimately, to keep from paying you.

So this was the subject of the discussion, because he had to put in his contract when our bills that we issued would be paid because upon becoming past due they were going to charge us interest.

Q Mr. Powrie, I would like you to first explain to the jury -- I realize you are testifying in full here -- I want you to just tell the jury what was the need for a factor in your business. Why did you need a factor?

A A factor creates a cash flow that a business doesn't otherwise have. They give you immediate cash instead of having to wait.

Q Thank you.

MR. TOPKIS: Objection.

THE COURT: How do you know it was of interest to him?

THE WITNESS: Because he said it was.

THE COURT: Then testify what he said to you. Don't hive us conclusions.

Q Tell us what you said to him and what he said to you.

A He said concerning this footnote that this didn't git their standard procedures, that they required that all goods and services be delivered before their clients billed the csutomer. I told him that in our case, in the contracting business, that we were required to commit months and somes a year in advance for fabrics to go on a particular job, and that we were required to hold these, which was investing money far in advance of our being able to bill for it; that we as often as we could, if the circumstances warranted, would go to a customer whose contract we held to equip his building and we would ask him if he would purchase the inventory or if he would somehow pay in advance for future services.

Mr. Hornickel stated that he guessed they could handle this, but that our contract would have

to read as they normally drew them, but that as these incidents came up, which were going to be few in number by my statement to him, we would handle them as they came.

Q Did he say anything further to you or you to him concerning any matter congained in that statement?

A Well, he took a copy of this statement, and I am sure we discussed the various sales amounts and the profit and the various items of the account. If he had questions I answered them. I specifically don't recall, but I know we discussed the various accounts on the statement and the condition and the profit and that sort of thing.

Q Could you, to the jury, read the footnote you have been referring to, Mr. Powrie?

A The footnote appears on the balance sheet page, and on the P & L, the income statement, page. It is worded differently but it says on the balance sheet page:

"Note: Includes sales and profits on contracts not complete. All costs of completion have been accrued."

On the income statement the note says:

"Sales and profits on contract not completed

was Moran, Turner, we had done three huge apartment buildings in St. Louis, and Moran, Turner was the combination of those contractors that did that work, we sent them an invoice with the Dommerich stamp on it, and it took about two weeks of correspondence to straighten out who Dommerich was.

I remember going to Mr. Hornickel and telling him the problem. I framed a letter that he signed which we sent to Moran, Turner telling them to pay Dommerich or pay us, but pay us, pay either Glass Fabrics or Dommerich. And that was an illustration of the confusion this stamp caused, so we sometimes left it off. I don't remember too many illustrations.

Q In the year following the execution of that agreement, 1963, did Dommerich make advances against your receivables and generally act as a factor of your account?

A Yes. They made 90 per cent advances, as the contract called for.

Q Was that satisfactory to you?

MR. TOPKIS: Objection.

THE COURT: That's what the contract called for, he said.

Q Did any person from Dommerich during 1963 ever make any objection to the way you were doing business or express dissatisfaction with your account, Glass Fabrics?

A I heard nothing but satisfactory remarks about our company until August, 1966.

Q Was an agreement executed between Fenestra Fabrics and L. F. Dommerich & Company on or about March 16, 1964?

A Fenestra? They may have, but Textura executed one in 1964.

Q I show you Defendants' Exhibit 309.

A Yes, apparently Fenestra also signed.

MR. BURGESS: This is Defendants' Exhibit 309. I would like to offer it in evidence as Plaintiffs' 834.

MR. TOPKIS: The copy we have, your Honor, is signed on behalf of Dommerich, but it is not signed by Fenestra. If it was ever signed by Fenestra I have no objection to it, but if it wasn't I don't think it belongs in the case.

THE COURT: Do you have a signed copy?

MR. BURGESS: We don't, but I don't believe any objection was raised to this.

MR. BURGESS: Thank you very much, Mr. Powrie. I think that clears that up.

I would like to introduce at this time -- your Honor, we had a contract between Fenestra and Dommerich, and I would like to add to the contract by introducing a contract between Textura and Dommerich, and there has been no objection by the other side.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 835 was received in evidence.)

MR. TOPKIS: What's the date of that?

MR. BURGESS: March 16, 1964.

Q Let me show you a letter dated August 10, 1966, to Textura, Ltd. from Dommerich. Will you please identify that for the court and jury?

A It is dated August 10th. It is on the letterhead of L. F. Dommerich & Company, addressed to Textura, Ltd. and signed by William Hornickel, Vice President.

MR. BURGESS: I would like to offer that letter in evidence.

MR. TOPKIS: No objection.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 836 was received in

evidence.)

Q Could you read that letter to the jury?

A "August 10, 1966. Textura, Ltd., 9348 Santa Monica Boulevard, Beverly Hills, California 90201.

"Gentlemen:

"In accordance with our recent conversation, we are writing this letter to advise you formally of our decision to terminate the factoring arrangement between us 60 days from this date as provided in our agreement of March 16, 1964.

"Assuring you of our continued willingness to cooperate, we are,

"Very truly yours,

L. F. Dommerich & Company,

A California corporation,

William C. Hornickel, Vice President.

"Registered Mail."

Q By that date had you received any -- did anyone from Dommerich tell you why they had cancelled your agreement?

A No. Mr. Hornickel had been in prior to this, but he said he didn't know why.

THE COURT: There is some reference to a prior conversation, I think, in the letter.

THE WITNESS: Yes, sir.

THE COURT: That doesn't mean anything.

THE WITNESS: That's what he is referring to, I think.

Q Is that the conversation that you have just testified about, Mr. Powrie?

A Yes, it is.

Q Now, this is in August of 1966. What effect did this cancellation by Dommerich -- did you subsequently attempt to obtain another factor?

A Yes. I must have talked to six or seven of them.

Q And did you succeed in obtaining another factor?

A No, I did not.

Q Did there come a time when anyone from Dommerich did give you any reason for the cancellation of the agreement?

A I never heard a reason from --

THE COURT: The answer is "no."

THE WITNESS: I think the answer is "yes."

A I had a conversation with Louis Moskowitz in New York in November, 1966. I was in New York and called his office to make an appointment. I am not

company real estate or didn't, and I wouldn't ask you whether you think our expenses are in line because expenses don't show anything."

But he said, "That's the end of the conversation. I don't want to hear anything more about it," and I was dismissed.

Q Going back to the status of your account with Dommerich in July and August of 1966, I believe you testified, and Exhibit 532 will show, that the reserve held was in the amount of $84,000. What effect did this have on Textura's ability to do business?

MR. TOPKIS: Objection, your Honor.

MR. BURGESS: Your Honor, I think he can testify to this. He can testify to the effect of --

THE COURT: That he had a credit of $84,000 with Dommerich.

MR. BURGESS: No, that they had held back $84,000 owing to Textura.

THE COURT: I would call that a credit of $84,000. You would call that a credit, wouldn't you?

THE WITNESS: Yes, sir.

Q Could you answer the question, please, Mr.

Powrie?

A The effect was that we didn't have cash to operate with.

Q At the same time did Clark-Schwebel continue on a cash basis?

A Yes.

MR. TOPKIS: Objection, your Honor. That's been asked and answered at least twice, most recently this morning.

(Sustained.

Q Mr. Powrie, did you receive any communications from any personnel of the defendants during the months of July and August concerning your account?

A We received continuing communications. It was a matter of almost daily that one would be calling on something they wanted. They wanted $1.50 to $1 cash, they wanted different terms, they wanted -- problems with shipments; it was continuous. There was almost no way to run a business with the amount of contact that I was getting from the defendants.

Q At this time in your operations to what were you directing your energies in the business?

MR. TOPKIS: Could I have the question back?

(Question read.)

MR. TOPKIS: And "this time" is the summer of 1966?

MR. BURGESS: July and August of 1966.

A Well, I'm not sure. I was trying to run a business, and I was involved with running to New York and trying to keep my head above water with the problems I had with the defendants, and later with the Dommerich Company.

Q Mr. Powrie, subsequent to the cancellation of your agreement did Dommerich enter into an extension of that agreement?

A Yes.

Q I show you Plaintiffs' Exhibit 206 for identification.

THE COURT: It's a termination, not a cancellation.

MR. BURGESS: Termination. Excuse me.

A This is a document dated October 7, 1966, from L. F. Dommerich to Textura, Ltd. on this subject.

MR. BURGESS: I offer that in evidence.

MR. TOPKIS: No objection.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 206 was received in

evidence.)

Q Mr. Powrie, regarding the loan which Dommerich made to you, did there come a time -- was that loan repaid in full?

A Yes.

THE COURT: Is that one of the loans we were talking about earlier? There were a couple of loans.

MR. BURGESS: Your Honor, I am talking about the loan to Mr. Powrie personally that was made in 1966.

THE COURT: Because you were discussing other loans. I wasn't sure which one you were referring to.

Q Mr. Powrie, at the end of the time that Textura finally went out of business -- what date did Textura finally go out of business?

A December 15, 1966.

Q -- did Fenestra cease operations at that time?

A I am confused by "going out of business," but I filed for the benefit of creditors on December 15, 1966, and I think it continued as a business to mop up for the rest of the year, and the assignee's referee

AFTERNOON SESSION

(2:10 p.m.)

(In open court; jury not present.

THE COURT: I thought we better clarify some things before the jury comes in. I don't know whether the testimony this afternoon is in the area that objection has been raised.

MR. BREINDEL: I think it is, your Honor.

THE COURT: You mean you are going to attempt to prove the existence of a conspiracy through statemnts by Mr. Clark? Is that your purpose?

MR. BREINDEL: Yes.

THE COURT: I would rule at this stage of the game it would not be admissible.

MR. BURGESS: Your Honor, could we take them in subject to connection later?

THE COURT: No. Possibly you might be able to recall Mr. Powrie for that purpose. I would very much doubt it, though.

MR. BREINDEL: Your Honor, excuse me.

THE COURT: For a good many reasons. But I certainly, on the basis -- and this, of course, I think would apply to Mr. Grafstrom.

Let me ask you this. Is Mr. Clark a stockholder of Clark-Schwebel?

MR. BREINDEL: You mean presently, your Honor?

THE COURT: Was he a stockholder?

MR. MC GANNEY: Yes, your Honor, he was.

THE COURT: And I take it a substantial stockholder. It really doesn't make much difference.

Is there any dispute about that?

MR. BREINDEL: I don't believe so, your Honor.

THE WITNESS: He was also a stockholder of Textura.

THE COURT: As far as the dead-man statute was concerned, it was directed to his being a corporate officer or an employee. I don't know if the brief directed itself to the fact he was a stockholder.

MR. BREINDEL: Our brief directed itself to his being an agent.

THE COURT: Agents, employee or officer, yes. But he was something more than that, he was financially involved and had an interest in the company.

The defendants -- I don't know whether all

defendants, but J. P. Stevens has admitted, possibly on behalf of all the defendants, there was price-fixing in the industrial field.

Now, which defendants sold in the industrial field to Textura?

MR. HARDISON: Burlington did, your Honor, in very limited amounts.

MR. TOPKIS: To the extent of about $2000 in 1956.

THE COURT: Are you speaking for Stevens now?

MR. TOPKIS: Stevens sold nothing.

MR. MC GANNEY: Clark-Schwebel did not sell anything.

THE WITNESS: They sold more than Hess-Goldsmith did to us of industrial.

MR. BREINDEL: The amounts of the purchases with respect to Hess-Goldsmith are in dispute. It is also our position J. P. Stevens in fact did sell industrial fabrics to the plaintiff.

THE COURT: It hasn't been shown yet, has it?

MR. BREINDEL: Not yet.

MR. BURGESS: I think Mr. Atlas will be

introducing invoices this afternoon that will bring that issue before the court.

THE COURT: I have no objection to introducing post-1964 vouchers at this time.

MR. TOPKIS: Invoices that Mr. Atlas wants to introduce this afternoon, I am advised, and perhaps I am in error, date from 1959 and earlier.

MR. BREINDEL: That's right, your Honor.

THE COURT: I am afraid you will have to postpone that offering then until their relevance becomes established. But even aside from a possible application to the New York dead-man statute, I have very serious question as to the admissibility of any statements. In the first place, they would have to be admissible solely as to the company where there has been a foundation laid, namely, in the area of industrial fabrics.

I have looked at some of the testimony, and it is far from being specific as to these defendants. Aside from that, it's hornbook law that such statements by an alleged conspirator can't be admitted against the co-conspirators until there is independent evidence of a conspiracy. That is hornbook law.

It would also have to be shown that the state-

ments were made in furtherance of the conspiracy.

If the testimony is inadmissible against Burlington and Stevens, it's got to be inadmissible against the defendant Clark-Schwebel because the complaint charges a conspiracy and the only defendant-co-conspirators named are Burlington and Stevens, and according to the statements I have seen they are the only ones named in any specificity in the so-called admissions.

On the present state of the record it seems very clear to me that at the present time, at least until there is independent evidence of the conspiracy to fix prices in the decorative fabric area, the statements are not admissible and we are just wasting our time. That's why I felt we ought to clear this up outside the presence of the jury.

I am still working on the question whether Textura acquired any cause of action from Glass Fabrics. I haven't had too much help on the subject by your citations, but I am working on the subject. That's why I would suggest at this time the vouchers that be produced not be Glass Fabrics' vouchers, except possibly to the extent that Textura may have acquired these accounts, or whatever the case may be. But that would have to be very carefully gone into.

MR. BREINDEL: Your Honor, might I just direct myself to one point. It is my understanding that the statements of Mr. Clark being admissions or declarations against interest need not be made in furtherance of the conspiracy, and that in any event the statements and admissions --

THE COURT: There has to be proof of a conspiracy, you will grant me that, independent proof of a conspiracy.

MR. BREINDEL: We certainly hope there will be independent proof of a conspiracy, your Honor.

THE COURT: As to decorative fabric.

MR. BREINDEL: That is true.

In any event, it would be admissible against defendant Clark-Schwebel and, subject to connection, at a later point could be admissible against the other two defendants.

THE COURT: This would turn out to be an attempt to be an attempt to bamboozle the jury, because you are attempting to get the evidence in even though it may later turn out to be inadmissible.

MR. BREINDEL: In my understanding it is clearly admissible against Clark-Schwebel.

THE COURT: I am not satisfied it is,

so I suggest you not introduce them today.

MR. BREINDEL: I submit in any event it is admissible with respect to the question of industrial price-fixing.

As we have pointed out to you in our prior memorandum of law, in most respects a lot of the same evidence tending to establish the industrial price-fixing conspiracy will also --

THE COURT: This is merely an admission. My present ruling is that on the basis of the present record this is an attempt to unduly and prejudicially influence the jury, because it is perfectly possible for you to oay this foundation, if you can, and then introduce this evidence, but by saying you want to introduce it now and then see how things come out, then if they don't come out I've got to declare a mistrial, and I don't want to try this case a second time.

Okay?

MR. BREINDEL: Yes, your Honor.

M A L C O L M G. P O W R I E resumed.

THE COURT: Bring in the jury.

(Jury present.)

MR. BURGESS: Your Honor, I have a number of questions which continue on the same subject of the

credit conspiracy, and I intend to ask those.

THE COURT: All right.

DIRECT EXAMINATION CONTINUED

BY MR. BURGESS:

Q Mr. Powrie, you testified this morning that you were on a cash basis with Clark-Schwebel since March of 1966. Did at any time any person from Clark-Schwebel ask you to pay a greater amount of cash for goods purchased from them?

A Yes.

Q When was that?

A I'm not certain, but I think it was at the XII Caesars luncheon meeting we had with Jack Schwebel and Ray Nordheim.

Q Could you tell the jury the approximate time of that meeting?

A It was in September.

Q Who was present at that meeting?

A Mr. Jack Schwebel, Mr. Raymond Nordheim, Mr. Grafstrom and myself.

Q Could you tell me what was said at that meeting by you and what was said by Mr. Schwebel or Mr. Nordheim, identifying the speaker?

A I think it was Mr. Schwebel, but I am not

certain, it was one of the two that at that point asked us to pay $1.50 for every dollar we paid when we bought fabric.

MR. BURGESS: Yes, it is.

THE COURT: That is between July and December.

MR. BURGESS: ye.

A In December, 1966, I was looking for 1200 yards of a fabric called Ultima, which Stevens wove, and I called John Wilson from Los Angeles to New York and asked him to sell it to me for cash.

Q First of all , there is confusion here.

Mr. Powrie, you apparently misunderstood my question. The question was about Burlington. Did you ever approach any officer of Burlington asking them to sell you goods for cash?

THE COURT: Between July and December 15th?

A Well, in a telephone conversation I had been talking to Mr. Shutz, and he suggested that we pay cash. It never materialized, but ghat is the only discussion I remember. He said that he wanted cash and that it could not be used to purchase goods; he had to charge it to my account; it was one of the many phone calls on many subjects during that period of time. I don't think that materialized. I think we continued on open account with him, except for one $1200 payment in cash.

Q When you paid an invoice at this time to defendant Burlington Industries did they apply it to back

invoices or did they allow you to pull out goods for cash with it?

A No, they didn't allow me to pull out goods for cash. It was applied to invoices we held.

Q Was there any time prior to December of 1966 when you approached any officer of Stevens regarding the purchase of additional fabric?

A In December of 1966, I called John Wilson on a long distance telephone from Los Angeles and I told him we needed 1200 yards of Ultima for a back job. Actually, it was the United California Bank lobby. He said, "I don't think I will sell it to you. I don't like what we read in the papers."

I said, "What do you read in the papers?"

He said, "That you are suing us."

Q Did he indicate anything further to you in this conversation?

A No. I had previously called Mr. Knisel to clear whether I could buy it for cash at this point and then he said, "If you want to," and then I called Wilson and he turned me down.

THE COURT: What was the date of this phone call to Mr. Wilson?

A About the 8th, 9th, 10th, about the middle of

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q These invoices, you assert they were for merchandise which Textura did not ship, is that right?

A That's right.

Q There is a fabric here named New Vista and one of these invoices.

Do you recall that fabric?

A Yes.

Q Why didn't you ship that?

A I don't know. It might have been the wrong color at the time, or something.

Q And there is a fabric here named Luxura.

Do you know why you didn't ship that?

A I have no idea, except that if we didn't fill the order it meant that we didn't have the fabric.

MR. TOPKIS: I am at a loss,your Honor, then to discover what these are supposed to prove.

THE COURT: They are received subject to connection.

DIRECT EXAMINATION CONTINUING

BY MR. BREINDEL:

Q Mr. Powrie, where were these invoices which have been marked as Plaintiffs' Exhibit 844 kept?

mdjw 10 Powrie-direct

A These were kept in the shipping and receiving department in a file they called the bin. There was always some of these in the bin, and at that time these were unfilled orders in December of 1966.

Q Do you know where the orders which constitute Plaintiffs' Exhibit 844 were actually located at the time Textura went out of business in December 1966?

A Yes.

MR. TOPKIS: What orders?

MR. BREINDEL: Did I say orders?

MR. TOPKIS: Yes.

MR. BREINDEL: I am sorry.

Q These documents which constitute Plaintiffs' Exhibits 844 and 843 were located where at the time Textura went out of businessin December 1966?

A They were removed from the shipping department and placed in our bookkeeper's department in a file.

Q At the time Textura went out out of business did it have pending contracts or purchase orders for the sale and/or installation of fabrics or draperies other than those covered byPlaintiffs' Exhibits 843 and 844?

A Yes.

Q I show you a document marked as Plaintiffs' Exhibit 590 for identification and ask you if you can

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VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q When were you supposed to do this, Mr. Powrie?

MR. BREINDEL: Do what?

MR. TOPKIS: Perform this contract.

A When were we supposed to begin the installation?

Q Yes.

THE COURT: Are we talking about the same document?

MR. TOPKIS: Yes, your Honor, the one dated August 1, 1966, between Fenestra and somebody or another relating to the Olive View Hospital.

A We never did start this job. We were out of business by the time it was supposed to be started.

Q There is no starting date mentioned in this contract?

A No.

Q What fabrics were to be used?

A This was a fabric we called malibu. That was specially purchased for this job.

Q From?

A I think it was Richloom.

Q Who?

A I think it was Richloom.

MR. BREINDEL: It is our position they would have made their ordinary profit had it remained in business.

THE COURT: I will take it for that limited purpose.

(Plaintiffs' Exhibit 586 was received in evidence)

THE COURT: Are all of these documents really going to the question of damages?

MR. BREINDEL: Damages as well as the fact that -- well, if you want me to make an offer of proof out of the hearing of the jury, your Honor.

THE COURT: Let's step up to the side bar.

(At the side bar.)

MR. BREINDEL: We are offering these contracts to show damages on the ground that they were not filed when Textura went out of business.

THE COURT: Why don't we try the damages case separately.

MR. BREINDEL: As well as to show the fact of the truth of the conspiracy, to show that Textura had a great volume of business, of orders, of existing contracts and potential contracts when it went out of business in December 1966, and had it been able to get fabric, they would have stayed in business.

THE COURT: Well, it is very tenuous but go ahead.

(In open court.)

BY MR. BREINDEL:

Q Mr. Powrie, can you identify this document, which is Plaintiffs' Exhibit 587 for identification, for us.

A Yes.

Q Will you identify it for us, please?

A This is a contract between S. Jon Kreedman & Company and Fenestra. It is a contract between Fenestra Fabrics, Inc. and S. Jon Kreeman & Company to install

drapery materials in a building called One Wilshire Building, Wilshire Boulevard at Grand Avenue, Los Angeles, California.

Q When was the installation supposed to begin?

A When they were ready for our product, and it was supposed to begin in early '67.

Q Can you tell us what the total sales price was as reflected on that document?

A $11,769.11.

Q Did Textura ever do any work in connection with that job?

A No, they did not.

MR. BREINDEL: I would like to offer in evidence Plaintiffs' Exhibit 587.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q This document is dated April 5, 1965? Is that the same one we are talking about?

A It is dated December 10, 1964.

Q December 10, 1964.

What fabric were you to use on this one?

A This was a Rovena-Verele -- I can't think of the name.

Q Spectrum?

A Yes.

Q Verele is not made out of fiber glass, is it?

A No.

Q Who did this job?

A Solartex.

Q The same company you mentioned before?

A The same one that did the Olive View Hospital.

Q And you worked for that company when this job was done?

A That's right.

Q What were you being paid by that company?

MR. BREINDEL: I object, your Honor. He can go into that on cross-examination.

MR. TOPKIS: All right.

Q Why wasn't the contract completed before the end of 1966?

A The building wasn't ready for our installation.

Q And when was it completed?

A During 1967. I think it took most of the year.

Q Do you recall when installation began?

A I would say in February. I'm not sure.

Q Are you sure it didn't begin before December 15th, 1966?

A I know it did not begin before that date.

MR. TOPKIS: Thank you.

Q Wasn't the total purchase order subsequently reduced to $27,000?

A No. It was subsequently increased to $115,000.

MR. TOPKIS: We will go into that later.

Thank you.

MR. BREINDEL: I again offer Plaintiffs's Exhibit 587 in evidence, your Honor.

THE COURT: Received.

(Plaintiffs' Exhibit 587 for identification was received in evidence.)

xx MR. BREINDEL: Would you mark this as Plaintiffs' Exhibit 845 for identification, please.

(Plaintiffs' Exhibit 845 was marked for identification.)

xx BY MR. BREINDEL:

Q Mr. Powrie, can you identify Plaintiffs' Exhibit 845 for identification?

A Yes. This is a contract dated October 27, 1966 with a firm called Demmon-Hunter, Inc. to install our materials in their building.

Q Can you tell me who signed that contract, Mr. Powrie?

A This is signed by Roberts L. Johnstone.

Q In what capacity did he sign it as set forth in that document?

A He signed it as Johnstone-Ferrall, Inc., manufacturers representative for Textura, Limited.

Q And did Textura ever do any work on that job?

A No.

Q Did the drapery installation on that job begin after December 15, 1966?

A Yes.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q Who did the job?

A Johnstone-Ferrall, Inc.

Q The same company that signed the contract?

A They were our agents. They signed the contract as our agents but they went ahead and finished the job.

Q The job was done with the fabric line that we have --

A Yes.

Q Who supplied that fabric?

A Clark-Schwebel.

Q Did they do that at your request?

A They did it at Johnsone-Ferrall's request. Actually it was sold to Consolidated Textile Company of

San Francisco who financed the job for Johnstone-Ferrall.

MR. TOPKIS: I don't understand all of these, your Honor, but I suppose this is as good as any of the others.

THE COURT: Received.

(Plaintiffs' Exhibit 845 for identification was received in evidence.)

THE COURT: It will be received subject to connection.

MR. BREINDEL: Would you mark this as Plaintiffs' Exhibit 846 for identification, please.

(Plaintiffs' Exhibit 846 was marked for identification.)

BY MR. BREINDEL:

Q Can you identify Plaintiffs' Exhibit 846 for us, Mr. Powrie?

A Yes. This is a contract between Fenestra Fabrics, Inc. and the Hirschmann Industrial Corporation who were constructing a building in El Monte, California.

Q What is the date of that contract?

A October 28, 1966.

Q Did Textura or Fenestra do any work on that contract prior to December 1966?

A No.

Q Do you know when the drapery installation on that contract began?

A About the middle of 1967.

Q Can you tell us the total sales price as reflected in that document?

A $14,000-some hundred.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q At the time of this document, October 28, 1966, Textura did not own Fenestra, did it?

A October? No. I think that's right.

Q You had bought it for 500 from Textura, hadn't you?

A Mr. Grafstrom and I -- well, actually I paid the money. We issued the stock to Grafstrom and myself.

MR. TOPKIS: I don't see what this proves, your Honor.

THE COURT: Subject to connection, it will be received.

(Plaintiffs' Exhibit 846 for identification was received in evidence.)

MR. BREINDEL: Would you mark this as Plaintiffs' Exhibit 591 for identification.

(Plaintiffs' Exhibit 591 was marked for

identification.)

BY MR. BREINDEL:

Q Mr. Powrie, can you identify Plaintiffs' Exhibit 591 for identification?

A Yes. This is a contract with the Carter Company, contractors and developers, for $26,800 between them and Fenestra Fabrics, Inc.

Q At the time Textura went out of business, was there an unfinished balance on this contract?

A Yes. I think there was about a $7500 unfinished balance.

Q Was that job completed by anybody after December 15, 1966?

A It was completed by the Solartex Company.

MR. TOPKIS: Same objection, your Honor.

THE COURT: Same ruling. Received subject to connection.

(Plaintiffs' Exhibit 591 for identification was received in evidence.)

MR. BREINDEL: Would you mark as Plaintiffs' Exhibit 847 for identification this document, please.

(Plaintiffs" Exhibit 847 was marked for identification.)

BY MR. BREINDEL:

Q Mr. Powrie, can you identify Plaintiffs' Exhibit 847 for identification for us?

A This is a purchase order from Bernard Harris & Co., Inc., exporters.

Q When is it dated?

A It is dated November 1st, 1966.

Q What fabrics does it cover?

A It covers Ultima, Satin Boucle and Homespun.

Q What is the total dollar amount on the face of the purchase order?

A $5120.

Q Did Textura fill any portion of this purchase order prior to December 15, 1966?

A No.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q Who did?

A Sherwood Gumbiner.

Q Mr. Gumbiner was with Menardi?

A Mr. Gumbiner stole this purchase order and filled it out of our stock.

MR. TOPKIS: Then I submit that it is irrelevant, your Honor. They can proceed against Mr. Gumbiner, if

they wish to.

THE COURT: I will let it stay in.

BY MR. BREINDEL:

Q Was this an unfilled purchase order when Textura went out of business?

A Yes.

Q Was Textura able to get the fabrics called for in Plaintiffs' Exhibit 847 for identification?

A No, they were not.

MR. BREINDEL: I offer this document in evidence.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q From whom did Textura try to get it ultimately?

A From John Wilson of J. P. Stevens.

Q When?

A In December, 1966.

Q After you had made your assignment for the benefit of creditors?

A Is that a statement or a question?

Q It is a question.

A I don't know the exact date.

Q You had a conversation with Mr. Wilson after you made your assignment?

MR. BURGESS: I will object to that.

THE COURT: I will sustain the objection to the document.

MR. TOPKIS: Thank you, your Honor.

BY MR. BREINDEL:

Q Mr. Powrie, at the time Textura went out of business, did it have a contract with the Del Webb Corporation?

A Yes.

Q In whose name was that contract?

A Well, I think it was with Textura, Limited. I'm not certain. It might have been Fenestra.

Q In any event, was there a balance on that contract at the time Textura went out of business in December of 1966?

MR. TOPKIS: The sum owing by Del Webb?

MR BREINDEL: Yes.

A There was a balance of $13,000, I believe.

MR. BREINDEL: Would you mark this document as Plaintiffs' Exhibit 848 for identification.

(Plaintiffs' Exhibit 848 was marked for identification.)

BY MR. BREINDEL:

Q Would you identify that document for us, Mr. Powrie?

A It is a Textura invoice No. 4235-G.

Q Would you read the name on the top of the invoice?

A It is between Fenestra Fabrics, Inc. and Del E. Webb Corporation. It is dated December 9, 1966.

Q What does it show, Mr. Powrie?

A It shows that we held a subcontract with a supplement totaling $70,896 with a previous billing of $57,617.60 and a balance of $13,278.40 remaining, and the floors yet to be installed are numbered 11, 12, 13, 14, 15, 16 and 17.

Q Was the balance of this contract, this $13,278.40, ever performed by any company?

A It was performed by L. F. Dommerich & Company.

Q By Dommerich & Company?

A Yes.

Q Was it performed? Dommerich & Company installed the draperies?

A They saw to it that they were installed; yes.

Q Do you know actually who did the installation?

A You mean who the workmen were?

Q Yes.

A Well --

Q Textura or Fenestra did not complete the balance

of that contract; is that correct?

A No, unless -- well, Dommerich I know took it over and completed it.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q Then what is this document, this invoice, Plaintiffs' Exhibit 848 for identification?

A This is our invoice to the Del Webb Corporation as of this date.

Q For work that you hadn't done?

A No. This shows a balance.

Q Was this sent to Del Webb?

A Yes.

Q It says "Sold to Del E. Web."

A That's right.

Q But you weren't selling them anything; you hadn't done it yet and it was Dommerich that ultimately did the work?

My question is, what is this invoice?

A It is an estimate. Del Web required us to periodically send them an invoice showing what is on this invoice giving them a position as to the billings on the job. It says "Estimated invoice."

Q So this is not a bill?

A Excuse me?

Q This is not a bill; this is not a statement to Del Web, "You owe us $13,278.40"?

A No. In this job we followed this form, and this is required of us periodically to show them the position of the job.

Q And Dommerich took this over and did the work?

A That's right.

Q Did Dommerich pay Fenestra anything for the assignment?

A I don't know. For the assignment? No.

MR. TOPKIS: I don't see its relevance, your Honor.

MR. BREINDEL: Again it is offered to show an amount of business remaining.

THE COURT: I will accept it for that limited purpose, to the extent that i may be relevant. That is all that it is received for.

(Plaintiffs' Exhibit 848 for identification was received in evidence.)

BY MR. BREINDEL:

Q Mr. Powrie, can you tell the jury what the term "drapery specification" means as that term is used in your industry?

A Well, the term "drapery specifications" means a description of our, in our case, fabrics consigned to us by our sources which were published by the owner of the building when the general contractor was constructing the building, and these published specifications were given to bidders.

Q Can you tell the jury what is the purpose of a building contractor, owner or architect in publishing building specifications such as drapery specifications?

A So he will be asking people to bid on precisely what he wants.

Q Now, during the years that you ran Glass Fabrics and Textura from 1953 through 1966, were there many instances in which you participated in the preparation of published drapery specifications?

A There must have been hundreds.

Q And were there many instances in which the drapery specifications that you participated in became the published specifications?

A Yes.

Q Mr. Powerie, I now show you a document which has been marked as Plaintiffs' Exhibit 583 for identification and ask you if you can identify it for us.

A Yes. This is the form of specifications put out

by the United States Navy to equip their enlisted men's barracks in Long Beach with draperies.

Q Does this document contain a drapery specification?

A Yes.

Q Did you participate in the preparation of that drapery specification?

A Yes.

MR. BREINDEL: I would like to offer this document in evidence.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q This is an indication for bids by the Navy, is that right?

A Yes.

Q For the enlisted men's barracks at Long Beach, California?

A Yes.

Q They wanted some curtains, is that right, draperies, rather? And they received the fabric?

A Yes.

Q For my edification, what did they put in the officers' barracks?

A I don't know.

Q The Navy is asking for bids to install draperies. Did anything ever come of it?

A Yes. We filled the job.

Q You did the job?

A Yes.

Q When did you do it, sir?

A After 1966.

Q Who did the job, Solartex again?

A No. I am mistaken on that. I think that job was done by Textura while we were still in existence.

MR. TOPKIS: Objection, your Honor. I don't see any relevance to it.

MR. BREINDEL: Your Honor, the purpose of this document is to show that the specification calls for a Textura fabric and that when Mr. Powerie was able to get an owner or a contractor to put a Textura fabric in the specifications, he alsmost always got the job because nobody else was going to get that frabric even though it was technically awarded.

THE COURT: All right. I will receive it for what it is worth.

MR. TOPKIS: May I ask just one further question on this, your Honor?

THE COURT: Yes.

BY MR. TOPKIS:

Q Did you tell the Navy that you manufactured Crown?

A I don't recall what I told them; no.

Q That's what the document says. I just wonder whether that was your idea or some fantasy on the part of the Navy.

A I don't think it was a fantasy on the part of anyone.

In preparing the specifications, I gave them the information necessary for them to draw it and that's the way they drew it.

MR. TOPKIS: All right.

(Plaintiffs' Exhibit 583 for identification was received in evidence.)

xx BY MR. BREINDEL:

Q Will you read to the jury, Mr. Powrie, the particular drapery specifications just referred to by Mr. Topkis which appear at page 2?

A "Materials used shall conform to the following;

"2C.3.1 Fabric shall be 100 per cent fiber glass, woven into the 'Crown' style and pattern as manufactured by Textura, Limited, 9348 Santa Monica Boulevard, Beverly Hills, California 90210. The

fabric shall be processed with a silicone base impregnation for maximum durability and drape ability. The fabric shall be guaranteed 100 per cent oncombustible. Color shall be 'egg-shell'. Width shall be 48 inches. This fabric shall have a warp count of 24 per inch using D.E. textured yarns and a filler count of 30 per inch using RX 43-3 ratine yarns, taffeta pattern. Fabric weight shall be 12.3 ounces per lineal yard at the 48/49 inch width."

Incidentally, Mr. Topkis, it doesn't say that we manufactured this.

MR. TOPKIS: Well, since Mr. Powrie endeavored to correct me, let me ask:

BY MR. TOPKIS:

Q Didn't you just read the term "Fabric shall be 100 per cent fiber glass, woven into the 'Crown' style and patter as manufactured by Textural, Limited . . ."?

A They are talking about the drapery manufacture here, I think; not about the weaving of the fabric.

Q They say "fabric".

A I know, but that's what they are talking about.

Q And you were their source for whatever they were talking about?

A Yes.

BY MR. BREINDEL:

Q Was Plaintiffs' Exhibit 583 distributed to other persons so that they could bid in competition with you for this job, Mr. Powrie?

A Yes.

Q During the years you ran Glass Fabrics and Textura, were there any instances in which you were not awarded the drapery contracts on jobs where you had participated in the published drapery specifications?

A Where they named our fabrics?

Q Yes.

A Well, there were instances where, for some political local reason -- and I remember one in Houston where we actually didn't get the contract -- they wanted someone in the City of Houston to hold the contract.

However, we acted in all respects as the contractor and did the job, and we paid the technical titleholder to the contract the 5 per cent override.

Q During the period from 1958 through 1966 when you were running Glass Fabrics and then Textura, can you remember any one instance in which the published drapery specification referred to one of either Glass Fabrics' fabrics or Textura's fabrics, that either Glass Fabrics

or Textura did not get the job?

A No. I can't recall any such instance.

Q Did Fenestra ever submit a proposal to furnish and install draperies in the third section of the Century City Building in Los Angeles?

A The third section? That's got to be the 1901 Avenue Building, the Stars' Building, I think. I don't know it by that name.

MR. BREINDEL: Would you mark this as Plaintiffs' Exhibit 849 for identification.

(Plaintiffs' Exhibit 849 was marked for identification.)

Q Did Plaintiffs' Exhibit 849 for identification refresh your recollection, Mr. Powrie?

MR. TOPKIS: About what?

MR. BREINDEL: As to whether or not he submitted a proposal for fabric in connection with the Sun City third section Los Angeles job?

A Yes, this is a letter I wrote to Stewart Schindler who was in charge of selection. He was an independent interior designer. He selected this but this was the 1901 Avenue of the Stars' Building. I call it and he called it so I call it third section.

Q Can you identify that document for us, Mr. Powrie?

Q Were these job status reports made in the regular course of Textura's business?

A Yes.

Q And was the regular course of Textura's business to make such reports?

A Yes.

Q What was the purpose of these reports?

A To keep the home office apprised of what was being worked on and its position as far as how close we were to a sale; or if it was a sale. We classified -- we asked them to let us know what jobs they were working on and its position, whether they had a contract on it, specified, or whether it was just being worked on.

Q I would like to show you a document, Mr. Powrie, which has been marked as Plaintiffs' Exhibit 623 for identification, and ask you if you can identify that for us.

A This is a job survey report from our New York office dated September 1, 1966.

Q What does it show?

A On the left-hand side it identified the job. Then these three classifications, whether we hold a contract or not, this is the first column, next tothe name of the job, and whether it was specified or not next to that, and whether we were working on it or not next to that.

THE COURT: Are you sure we haven't gone into this?

MR. BREINDEL: I don't believe we have.

THE COURT: I don't know what it means, but I suppose he was working for the business.

MR. TOPKIS: Exactly. He was president of the company, I believe, and that's all been gone into.

THE COURT: Go ahead.

Q Will you answer the question, Mr. Powrie?

A I was engaged in all the daily pursuits of running a business. I was traveling on sales matters, holding sales meetings, visiting on my own behalf the contract jobs that I was selling. I had the normal personnel problems and routine of running a business.

Q Did there come a time in 1966 when there was a substantial change in the way you spent your business time in behalf of Textura?

A Yes.

Q And when was that?

MR. TOPKIS: Objection. What difference does it make?

THE COURT: I will allow it.

A Following -- I would say beginning in April of 1966 I was not following any of the routines. I was

going to New York at the demands of Mr. Nordheim to meet at quality discussions with Mr. Schwebel, I was in New York at the request of Mr. Knisel who said he wouldn't accept any orders if I didn't come.

I was later on looking for a factor, which took a great deal of my time. I had to go to New York on that at least one two occasions.

I was concerned with matters I had not been concerned about, such as telephone calls and discussions with defendants about length of time of payment of invoices, and terms, and interest and that sort of thing.

Q As a result of these activities, did you have to neglect your ordinary business activities on behalf of Textura and Fenestra?

MR. TOPKIS: Objection. What's this got to do with this case?

THE COURT: I will sustain the objection. I don't know what his normal business activities were.

MR. BREINDEL: He already testified to that, your Honor.

THE COURT: I will sustain the objection.

MR. BURGESS: Your Honor, at this time I would like to introduce two Hess-Goldsmith contracts. One is 7434 with two attachments. Another one is a

MR. BURGESS: I would like to offer that in evidence.

THE COURT: Received.

(Plaintiffs' Exhibit 537 was received in evidence.)

BY MR. BURGESS:

Q Mr. Powrie, I would like you to read that document to the jury.

MR. TOPKIS: Three simple pages?

MR. BURGESS: I will provide copies.

Q Go ahead, and read it, Mr. Powrie.

A It's a memorandum addressed to P. Cottschalk from Paul A. Erskine, subject Textura, Ltd. It is dated November 21st, 1966 with copies to Mr. Hughes, Mr. Schutz and Mr. Donnelly.

"As I indicated on the telephone, I had a meeting with Mal Powrie on Wednesday, November 16. Also present at various times were two employees, Vince Aker and Elias Alonzo. Mal was anxious to review the status of each of the fabrics that we hold contracts on and I would like here to review with you the nature of the discussion on each of these styles.

"6011/48 (Crown) Several problems concerning

A It had been going on since June, theis problem that they couldn't solve.

Q And he is proposing that samples be sent through and they will run a yard of each and submit them to you for your approval?

A It is a big help when we are just about out of business in November.

Q You rejected that proposal?

A I had it up to here with this whole conversation.

THE COURT: Just answer the question.

A I rejected what?

Q The proposal.

A That what? There was no time left to wait for another hundred yards. I rejected it.

Q Fine. And so far as Satin Boucle is concerned, there too they proposed submitting samples for your approval and you rejected that, is that right?

A They say they can't even guarantee production on it. How can I plan my business around that?

Q You didn't accept that proposal either, is that correct?

A No, no way. On Crown they wouldn't guarantee delivery either.

Q Now, On New Vista, that was the fabric of which

they had a good supply in Los Angeles and you didn't want it?

A I didn't say that I didn't want it.

Q You didn't buy any of it from Bill or in any significant quantity; is that right?

A Yes. That's what they say.

Q And they had woven that fabric specifically for you, hadn't they?

A Yes.

Q Now, so far as Homespun is concerned, there they were willing to take back all the yard goods and cancel the contract?

A That's right.

Q Was that satisfactory to you?

A This was supposed to be a duplicate of Hess-Goldsmith's Homespun and it was way off, and they admitted it, and I couldn't use it.

Q So you weren't interested in it?

MR. BURGESS: Your Honor, he said it was a duplicate of Hess-Goldsmith.

THE WITNESS: Excuse me. I meant Clark-Schwebel. It was supposed to be.

Q And it wasn't?

A No, it wasn't. You see, we were already saddle

with this and there was no way of getting a new weave in the line. It wouldn't look like what we were supposed to be getting.

Q They offered to close this out at 70 cents a yard and you didn't want it in any event, is that right?

A That's right.

Q As far as Mystique is concerned, there they were willing to take back all the goods on the Coast and consider the contract canceled; was that satisfactory to you?

A Their colors wouldn't hold.

Q Was that or was that not satisfactory?

THE WITNESS: It was satisfactory.

Q And you communicated all of this to Mr. Erskine?

A Yes. I think we had a meeting in December on this.

Q And this was just a couple of weeks before you made the assignment for the benefit of creditors?

A Yes, it was.

MR. TOPAIS: Your Honor, would it be convenient to take our afternoon recess now? I think I could get a little better organized if we could, or if you wish to go on, I could go on in any event.

THE COURT: You mean recess for the day?

the year end statement?

"A I wasn't proud of that statement."

A She was asking me whether I was proud of the net loss that year. I thought you asked me if I was proud of the year. I was. We had consolidated a whole lot of things that year and we were doing very well, I thought, to get them done. I wasn't proud of any loss, no.

Q And, as a matter offact, during the years that you were running Glass Fabrics and Textura, you lost money as often as you made it, didn't you?

A Yes. We ran in spurts. We --

Q And over the whole twelve years, according to your figures there was a net loss before taxes of about $60,000, isn't that right?

MR. BURGESS: Your Honor, I object to that characterization of this exhibit. Is that based on some sort of average that --

MR. TOPKIS: No, it's a total.

MR. BURGESS: Your Honor, I don't see hwo that's relevant. I don't think it is relevant to the lawsuit what he did in '57 and '58 and --

THE COURT: Is that your position in this case?

MR. BURGESS: No. I withdraw that.

Q Overall you lost about $60,000 in twelve years.

A I don't know whether we did or not.

Q Mr. Powrie, you had some money invested first in Glass Fabrics and then Textura, right?

A Yes.

Q There wasn't very much money invested by the stockholders in either of these companies, in terms of the total volume of business that those companies were trying to do, is that right?

MR. BREINDEL: I object to the form fo the question. As Mr. Topkis would say, let him ask how much was invested and compared to how much.

THE COURT: This is cross examination, counsel.

A I'll have to have the question again.

(Question read)

A That's wrong. I don't know really what you are asking but we invested about a quarter of a million dollars in Textura alone and prior to that almost a hundred thousand in Glass Fabrics.

Q Glass Fabrics was carried over into Textura, wasn't it?

A No, I'm not counting that.

Q You ran a financially thin operation, didn't you?

hpjw 10 Powrie-cross

A Yes.

Q What did you mean by a financially thin operation?

A We never had a surplus of cash and every time we got a surplus we put it into expansion.

Q So that you were trying to get by with as little money invested in the business as you possibly could, isn't that right?

A That's what you should do in every business. That's good business.

Q There are some companies in which you would say they were financially thin and some you would say they are financially thicker, isn't that right? That is, a little more capitalized.

A Yes, like your company.

Q I have to tell you, I don't have a company, but let that pass.

You were at all times in need of suppliers who would finance your operation, isn't that right?

A No.

Q Didn't you tell the Court and jury last week that the three defendants here and the extended credit that you said they offered you were indespensible to your operation?

A That's absolutely so. We had that you see, so

we didn't need any other suppliers.

Q But if they had given you just the ordinary contract terms you couldn't have operated.

A Who knows? That agreement was back in 1958.

Q You would have had to put a lot more of your own money in, wouldn't you?

A I may not even have tried.

Q In anyevent, you ran what you call a financially thin operation, didn't you?

A Yes.

Q And the thickness was supplied to the degree it was supplied by these three defendant companies advancing you money, isn't that right?

A It was a big help.

Q Those terms which they extended to you, you say, were unusually favorable, weren't they?

A Yes, they were.

Q And you appreciated them very much?

A Very much.

Q On occasion J.P. Stevens & Co. wrote you letters or in one way or another communicated to you a desire to impose some limits on the amount of credit that you had, is that right?

A I don't know whether they did or not. I'm

attempted to impose a $10,000 limit on your line of credit, right?

A Yes.

Q Prior to that time, you had had a $25,000 line of credit with Stevens, had you not?

A I don't know. I don't recall it. These credit ceilings were never observed. Mr Binnie was a second echelon credit man and I got letters of this type from him on two or three occasions. When the heat got strong enough, I would call Mr. Knisel and on one occasion I told them to cancel me out if they wouldn't conform to past practices and I got a letter of apology from Mr. Motzenbecker, saying whenever they got a new credit manager, he was talking about Binnie, they didn't understand our arrangement.

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Q In short, you didn't pay any attention to these limitations, is that right?

A That's right.

Q As a matter of fact, on occasions you ran up a credit balance with Stevens, that is, you owed Stevens as much as much as $60,000?

A That's probably so.

Q And ahy time Mr. Binnie or anybody else at Stevens objected to your running up too much credit, you would say "All right, cancel us and we'll buy elsewhere", is that right?

A I told him to talk to Mr. Knisel first and when he did, it got cleared up. Mr. Knisel is the one I had the arrangement with.

Q Didn't you say to him, "If you don't like giving me as much credit as I want, cancel me and I'll buy somewhere else"?

A No, that's not quoting me at all.

Q Let me ask you if you weren't asked these questions and gave these answers when your deposition was taken.

MR. TOPKIS: Your Honor, could the Court possibly explain to the jury what a deposition is in a litigation of this type?

and changing --

Q The feelings you said didn't make any difference you testified?

A No.

Q They never changed their practice of regularly extending you credit, is that right?

A That's right.

Q And Stevens never put you on a cash basis, did it?

A No, but they did threaten in the letter from Knisel to not fill any new orders for me.

Q But you had a talk with Mr. Knisel and got that straightened out within a few days, didn't you?

A Yes.

Q And they went on dealing with you on a credit basis?

A Yes.

Q So the statement is accurate that Stevens never put you on a cash basis?

A That's accurate.

Q Clark-Schwebel did put you on a cash basis for a time?

A Yes.

Q Burlington sometimes had you on a cash basis

and sometimes had you on a credit basis?

A Yes, that's right.

Q Most of the time on a credit basis?

A Right.

Q And there never was at any time after March 1, 1966, when all three companies had you on the same basis?

A That's correct.

Q Let's go to your dealings with Clark-Schwebel, if we may, Mr. Powrie.

You testified here last week, did you not, that you had some pretty bitter disputes with Clark-Schwebel over quality adjustments?

A Yes.

Q But again referring to my clients Stevens, they always made fair quality adjustments, did they not?

A Yes, and I think Burlington too.

Q Burlington also?

A Yes.

Q It was only Clark-Schwebel of whose quality adjustments you had any complaint, is that right?

A The adjustments, yes.

Q Everybody can make a mistake and ship out some defective merchandise, isn't that right? That's one of the problems of this fiber glass business, isn't that right?

A Yes, but how can they do that for months, I don't know.

Q Stevens didn't do that for months, did they?

A No, they didn't.

Q You don't claim that Stevens shipped you, even on the occasions when it did ship you, defective merchandise, that it singled you out for special treatment in sending you defective merchandise, do you?

A No, I have no idea.

Q You were as favored a customer of Stevens as anyone else, so far as you know, is that right?

A So far as I know.

Q It is not your claim that Stevens entered into any agreement with anybody, that Stevens would send you defective merchandise, is it?

A No, I don't know whether they did or didn't.

Q You are not claiming that they did?

A No, I don't think so.

Q In so far as Burlington is concerned, have you ever compared goods which Burlington sent you with goods which Burlington sent to some other customer?

A You mean for quality?

Q Yes, sir.

A No.

Q So you don't know Burlington singled you out to ship you defective merchandise when it was sending fine quality merchandise to some other customer, do you?

Answer yes or no, please.

A I don't know.

Q For that matter, even so far as Clark-Schwebel is concerned, you never made any comparison of the goods which Clark-Schwebel sent you with goods it sent to other customers, did you?

MR. BREINDEL: Are we talking about identical weaves?

MR. TOPKIS: Or comparable weaves.

MR. BREINDEL: Mr. Powrie testified they were confined to him. How could he compare them? That cannot be answered properly.

MR. TOPKIS: If he ever compared Clark-Schwebel goods that he received and someone else's that he received, I will accept his testimony.

Q Did you, sir?

A No, not for quality.

Q You never placed an order with J. P. Stevens and had them refuse to sell you, did you?

A July 21st, they said they were going to refuse to take new contracts from me.

for that reason either.

Q Then Stevens should have become your wealthiest supplier.

A Stevens, really they were a small source of fabrics. They weren't involved with any of our contract work. The fabrics were high styled for our decorator division and it didn't mean that much as far as the real side of our business is concerned.

Q If you wish, I will leave just right now and I will be very happy.

THE COURT: That might be a good idea.

10 o'clock tomorrow morning.

(Adjourned to Tuesay, October 22, 1974, at 10.00 o'clock a.m.)

CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs. 66 Civ. 4230

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, October 22, 1974;
10.30 o'clock a.m.

(Trial continued.)

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(In open court - jury present.)

M A L C O L M G. P O W R I E , resumed.

CROSS EXAMINATION (Continued)

BY MR. TOPKIS:

Q Mr. Powrie, I would like to ask you some questions about the controversy you had with Clark-Schwebel leading up to the arbitration that was filed in June of 1966. The dispute that you had with them was over quality wasn't it, not over credit?

A Yes, sir.

Q You tried to resolve the dispute repeatedly but you couldn't?

A That's right.

Q You were concerned about an arbitration or a lawsuit being instituted against your company, were you not?

A Of course.

Q You were concerned because you thought and expected that if a lawsuit or an arbitration were started against your company, it might affect your credit standing?

A Of course.

Q It might affect your relationships with other suppliers?

A Yes.

Q Not only of fabrics but of traverse rods and the other supplies that you needed to operate your business, is that right?

A Well, at that time I didn't -- no, that wasn't bothering me. It was my sources of fabric supply.

Q You were concerned that they would hear that you were involved in an arbitration or in a lawsuit and they would worry about your ability to pay them, is that right?

A Yes.

Q And the fact is that you tried and couldn't reach agreement with Clark-Schwebel?

A Yes.

Q It was Clark-Schwebel that instituted the arbitration against you, is that right?

A Yes.

Q That was pursuant to a clause in your standard form of agreement with Clark-Schwebel?

A Yes.

Q Actually, if Clark-Schwebel hadn't brought the arbitration against you, within a very few days you would have filed an arbitration against Clark-Schwebel, isn't that right?

A No, I considered it. I don't think so because it would have had the same effect if I had filed it on my creditors.

Q It would have the same effect on your credit whether they filed it or you filed it?

A Anything having to do with a $96,000 dispute against my company would have an effect no matter who brought it.

Q But the fact is that you decided to sue Clark-Schwebel, isn't you not?

A No, I had not.

Q Are you sure of that, sir?

A I am positive. I know I considered it because I thought there would be some advantage if we went first going to arbitration.

Q I have been asking you about your testimony at your deposition and now I will ask you about page 1200,

with the intention of filing an arbitration. I came to New York with the intention of filing an arbitration. Is that what you said?

A I am referring to what you first read, Mr. Topkis. He and I came to the conclusion that we must go to arbitration.

Q But you came to the New York to file an arbitration?

A The we is Clark-Schwebel and I.

Q And you, Malcolm Powrie, came to New York to file an arbitration, right?

A I intended to.

Q And they beat you to the punch?

A I said that before.

Q Okay, fine.

You don't have any reason to believe that J. P. Stevens participated in Clark-Schwebel's decision to file the arbitration, did you?

A I don't know.

Q You don't have any reason to believe that Burlington did, do you?

A At that time, I didn't have any reason to believe.

Q 1979?

A No. At the time they filed, Mr. Topkis.

Q Nor in 1970?

A I don't know I knew in 1970.

Q Well, let's see. Now we will go to page 1446 of your deposition and I will ask you, did you make this statement at line 17:

"I can't tell you that I know that Stevens and Mark Goldsmith participated in the decision, if that's the question, of claim seemed to go to arbitration. I don't know that.

"Q You have no information on that subject one way or another?

"A No."

A That's what I'm saying.

Q Okay.

Now, sir, you don't claim that Burlington worked with Clark-Schwebel on the arbitration claim, do you?

A I don't know what that means. What do you mean worked with them on it?

Q Well, let's see if once upon a time you knew what it meant?

MR. PFEIFFER: Objection, your Honor. The witness stated he does not know what Mr. Topkis means by this present question. It is ambiguous. I think he is

entitled to have it rephrased. The fact he understood it in 1970 --

THE COURT: I will give the instructions to the jury as to what is binding and what is not binding.

Q Mr. Powrie: In 1970 at page 309 were you asked these questions and did you give these answers:

"Q Are you claiming that Burlington was participating --

MR. BURGESS: If I could ask Mr. Topkis to delay just a little bit. We have a lot of testimony here. If I could get the page.

MR. TOPKIS: Certainly. Page 309. Page 309, line 3:

"Q Are you claiming that Burlington was participating with Clark-Schwebel in June of 1966 in the presentation of the $92,000 claim against Textura?"

And you answered;

"Is the question that they participated, that Burlington participated with Clark-Schwebel in Clark-Schwebel's pressing of their claims against us?

"Q Yes, that is correct.

"A No, I have no knowledge of that."

Were you asked those questions and did you give

those answers?

A Yes.

Q Now, sir, there came a time, did there not, specifically July 29, 1966, when you had a meeting at the St. Regis Hotel with Mr. Jack Schwebel of Clark-Schwebel and Mr. Raymond Nordheim of Clark-Schwebel and you settled the arbitration, right?

A Yes.

Q You made a handshake deal?

A I didn't make a handshake deal. We came to an agreement that wound up on paper.

Q But you first shook hands?

A I don't think we shook hands.

Q All right. In any event, a couple of days later the agreement was reduced to writing, is that right?

A Yes. I think Mr. Schwebel did that.

Q And Mr. Schwebel signed it, right?

A I am sure he did.

Q Plaintiffs' Exhibit 166, you remember that Mr. Schwebel signed that agreement, right?

A Yes, I do.

Q You didn't, did you?

A I thought I did.

Q The copy that's been marked in evidence is in the form of a letter from Mr. Schwebel to you dated August 4, 1966. That's the one that your counsel offered in evidence, and it doesn't bear any signature by you.

A Well, I signed it, Mr. Topkis.

Q You signed something, there is no doubt about that, but let's see if we can't refresh your recollection.

MR. TOPKIS: May I have 419, please?

(Document handed to counsel.

Q The document that Mr. Schwebel sent to you and expressed the agreement that you would pay Clark Schwebel $70,000 in three installments on September 1, October 1 and November 1, 1966, do you remember that? $23,500 first, $23,500 second and then $23,000, do you remember that?

A Yes.

Q But you didn't accept those terms, did you?

A I think you are right. I think that's so.

Q What you did was write him back, or call him back, and then he sent you another letter, didn't he? I show you Exhibit 419.

Skip 419. I think we can save time, Mr. Powrie, if we go directly to Plaintiffs' Exhibit 420.

MR. TOPKIS: I will ask the clerk to mark it as Defendants' Exhibit E for identification.

(Defendants' Exhibit E was marked for identification.)

Q Do you have a copy of Defendants' Exhibit E for identification, Mr. Powrie, the letter of August 22nd, from you to Mr. Schwebel?

A Yes.

Q You sent that letter to Mr. Schwebel, didn't you?

A I think I did, yes.

MR. TOPKIS: I offer it in evidence, your Honor.

MR. BURGESS: Your Honor, it refers to two prior letters, August 4th and August 16th. We have

no objection, provided those letters are supplied along with it.

MR. TOPKIS: The August 4th letter is already in evidence, your Honor, and the August 16th letter I don't seem to have. I suspect that that might be a typo and that's August 11th, and I decided to skip that because it's irrelevant.

THE COURT: Show it to Mr. Burgess and see if he wants it.

MR. TOPKIS: Do you really want that?

MR. BURGESS: Yes.

MR. TOPKIS: I have no objection.

MR. BURGESS: We would accept if the August 11th letter goes in with it.

MR. TOPKIS: Okay.

(Defendants' Exhibit F was marked for identification.)

MR. TOPKIS: I offer E and F in evidence, your Honor.

THE COURT: Received.

(Defendants' Exhibits E and F were received in evidence.)

MR. TOPKIS: May I show copies of just E to the jury, your Honor?

THE COURT: Yes.

(Defendants' Exhibit E handed to the jury.)

BY MR. TOPKIS:

Q Just so I may summarize, Mr. Powrie, it was now agreed between you and Mr. Schwebel that there wouldn't be any notes and instead of paying $70,000 by November 1st you would pay it by the first of the year, is that right?

A I haven't had the chance to look at this. You are talking about E now.

Q That's right, the letter of August 22, 1966.

A This would indicate we had a telephone conversation and came to agreement to pay the $70,000 at the rate of $10,000 every two weeks beginning September 1.

Q Right, and you wouldn't have any notes.

A Yes.

Q And Mr. Schwebel agreed to that?

A Well, it says that he did on the telephone here, yes, sir.

Q And then you asked for a further extension, didn't you?

A Yes. We met, I think --

Q Just answer yes or no, please.

A Yes, yes, we did.

Q And he agreed to that, didn't he?

A Yes.

MR. TOPKIS: I show Defendants' Exhibit G for identification to the witness, your Honor.

(Defendants' Exhibit G marked for identification.)

Q Defendants' Exhibit G embodies your second amendment, is that right?

MR. TOPKIS: I offer it in evidence, your Honor.

MR. BURGESS: No objection.

THE COURT: Received in evidence.

(Defendants' Exhibit G was received in evidence.)

MR. TOPKIS: To save time, your Honor, rather than distributing copies among the jury, I will ask the witness just this question:

Q Under this agreement you agreed to pay at the rate of $5000 every month beginning with November, is that right?

I am referring to page 2, paragraph 2.

A Page 3, paragraph 2.

Q Page 2, sir. It is the third page, but it is numbered 2.

A What paragraph, Mr. Topkis?

Q Paragraph 2.

A Well, we apparently agreed to pay them $5000 at this time, and did, and to pay at the rate of $5000 beginning in November.

Q Right. Until the entire balance was paid off?

A Yes.

Q If there was $65,000 remaining, that would be 13 months, right?

A I suppose so.

Q So that the final installment would be due in December of 1967, is that right?

A All right, if that's the arithmetic.

Q On September 30, 1966 you paid the first $5000, right?

A Yes. That was all we were able to do.

Q And you never paid another dime?

A That's right. This was October. By this time we were through.

Q Yes, sir, that's an answer to my question.

MR. TOPKIS: Has this exhibit been received

in evidence?

THE COURT: Yes. That is Exhibit G.

MR. TOPKIS: Thank you, your Honor.

Q When you originally met on July 29, 1966 at the St. Regis, with Mr. Schwebel and Mr. Nordheim, and you promised to pay $10,000 every two weeks -- I am sorry; promised to pay $23,500 on September 1st, $23,500 on October 1st and $23,000 on November 1st, although you made that promise you knew you couldn't possibly perform it, isn't that right?

A Yes, and we told them we couldn't too.

Q You told them you couldn't?

A Yes.

Q You know that -- well, let me ask you. Who is a man named Vernes Grafstrom?

A He was one of the holders of stock in our company.

Q He was present at that meeting at the St. Regis, wasn't he?

A Yes.

Q And you know he has testified that you told them nothing of the sort, don't you?

A I don't know anything like that, no.

MR. TOPKIS: I will come back to that.

Q Let me discuss with you now a meeting you had in July of 1966 with Mr. Knisel of J. P. Stevens, my client.

You had such a meeting, didn't you, sir?

A What was that date again?

Q July of 1966?

A Yes.

Q On the same trip to New York on which you met with Mr. Schwebel and Mr. Nordheim of Clark-Schwebel?

A Yes.

Q At that meeting with Mr. Knisel he asked you to personally guarantee your indebtedness to Stevens, didn't he?

A He asked that in a letter. He didn't enclose the forms for a personal guarantee when he demanded I come to New York.

Q When he demanded you to come to New York?

A When I demanded he come to New York.

Q That word "demand" is yours, not his?

A I don't know if it was used in his letter, but that's the sense of the letter.

Q The letter didn't have the word "demand" in it?

A He said, "It's too important to discuss on the

A I thought they did.

Q Well, you read your mail, don't you, sir?

A Yes, they canceled it, Mr. Topkis.

Q You got a letter of cancelation dated August 10th effective October 10th, didn't you?

A Yes.

Q And that is the letter that is in evidence?

A Yes.

Q But you didn't put into evidence the two subsequent letters in which they extended the credit, did you?

A They canceled as of October -- they did extend credit, yes.

Q As a matter of fact, until Textura made an assignment for the benefit of creditors, Dommerich was still factoring your accounts, wasn't it?

A Yes, it was to their advantage to collect the accounts.

Q Just answer the question.

A The contract provided they could do that.

Q You didn't put in the two extension letters last week, you didn't testify about that at all?

MR. BURGESS: We did put in an extension letter. It is not for the witness to put in evidence.

MR. TOPKIS: Let's make the record complete.

right?

A He said it.

Q In 1970 you said he didn't say it?

A I said he alluded to it. How do you allude to something without saying something?

Q I don't know, but when you say he didn't say it, I am willing to accept it if you are.

A Whatever I said in '70, I'll say now.

Q Fine. As a matter of fact, Mr. Powrie, you have told people at Stevens that so far as the various defendants were concerned, Stevens wore the white hat, haven't you?

A Yes, I did.

Q And that's your appraisal of them, isn't that right?

A They were the least involved, the less innocuous, the least culpable. They weren't involved in the contract business. They caused the least damage.

Q You said that of the three defendants, it was only Clark-Schwebel that put you on a cash basis, right?

A I think we have said that --

Q I think we have been over that. I'm just asking it by way of preliminary.

A I think we have also said on occasion Hess-

whether Mr. Colton had much to do with this, I'm not sure. I'm clear Mr. Goldsmith had the big office at that time and I assume he was the president and Mr. Clark was there at that time and there may have been others.

Q Did Mr. Goldsmith agree with respect to the terms of four months?

A It was probably finalized with Mr. Clark because I recall his explaining to me that the credit department would not go along with this and that the sales division had the option, if they wanted to use it, to take on the credit problem in this respect and that they had decided to do that.

Q Did you have occasion later on to report to the Burlington credit department that you had such an agreement with Mr. Clark or with the sales department?

A Did I report to them?

Q Do you recall discussing the agreement that you made with Mr. Clark with anybody at Burlington's credit department on some subsequent date?

A No, I'm sure that I -- I didn't go back and report to Mr. Schutz, if that's what you are saying, but --

Q With Mr. Schutz or Mr. Kelley or Mr. Garvey or anybody else at Burlington credit?

A I don't think I reported back to them. I don't

Q Was he in Burlington's credit department?

A Yes, he was.

Q Does that letter reflect the communication to you from Mr. Donnelly?

A Yes, it does.

Q But you testified a moment ago that before this meeting you had no contact with the credit department?

A I am talking about the New York credit department. Mr. Donnelly was the credit department from Burlington from Menardi & Company. I was with Menardi & Company at this time.

Q But you did receive this letter, Defendants' K?

A Yes, I think I remember it had to do -- we had to spend some time working it out.

Q What is the subject matter of that letter?

A Well, he apparently called me because he said supplementing our telephone conversation he is enclosing two sets of guarantee forms in duplicate. He is asking that six people, seven people sign guarantees for -- I have to assume it was Glass Fabrics. He doesn't say. Then he asked for a personal statement from them.

MR. BURGESS: Your Honor, has this been offered in evidence?

MR. HARDISON: I will offer it in evidence now.

Q Do you recall Mr. Donnelly asking for a personal guarantee in March of 1962?

A The date doesn't mean anything to me. I do recall that on occasion he asked me for a personal guarantee. And I think it was through Stevens once in a while.

Q Do you recall when he asked you for a personal guarantee?

A I think it happened off and on during our 10-year association. I don't remember the dates.

Q Would that be from 1958 until 1966?

A Yes. I think perhaps with Mr. Donnelly before that. These letters remind me that when I was still at Menardi, he was interested in a personal guarantee.

Q Did he ever tell you why he was interested in a personal guarantee?

A Credit men don't have to tell you why. I don't remember he told me why. It's sort of a knee-jerk reaction with credit men to demand all the security they can for everything. If I was a millionaire I think he would still have asked for it.

Q I think I have an exhibit here, Mr. Powrie, that was written to you at Glass Fabrics. This is 356. I'm not sure what the letter is now.

(Defendants' Exhibit N was marked for

identification.)

Q Would you identify that exhibit, Mr. Powrie?

A It is a letter dated May 15, 1964 addressed to me from L. F. Donnelly, credit department.

Q What's the subject matter of the letter?

A He says supplementing our conversation please find enclosed a guarantee form in duplicate.

MR. HARDISON: I offer Dendants' E in evidence.

MR. BURGESS: No objection.

THE COURT: Received.

(Defendants' Exhibit E was received in evidence.)

xxx Q Mr. Powrie, in 1965 did Mr. Donnelly discuss the matter of personal guarantee with you in connection with Textura's accounts?

A Yes.

Q Did he ask you for a personal guarantee that year?

A He and Mr. Schutz asked me for it.

Q This was the meeting you testified on your direct examination where Mr. Schutz came to California, is that correct?

A Yes. April.

Q Do you recall what your terms were in 1965,

April of 1965? Your credit terms with Burlington.

A In what respect?

Q Do you recall what your credit terms were in April of 1965?

A What are you asking me, what the credit ceiling was or --

Q No, what the terms. When the invoices were payable.

A Payable in 120 days. We discussed that with Mr. Schutz.

Q You don't recall being on 30 days plus 30-1/2 at about April 1965?

A 1966 I remember. That 30 plus 30-1/2 was, I think, '66.

Q Did you discuss the 120-day terms with Mr. Schutz in April of 1965?

A Yes.

Q Was interest being charged on your account at that time?

A There must have been because he said he would relieve us of that interest charge for the balance of the year if I would sign a personal guarantee, which I did.

Q And did you tell Mr. Schutz at that meeting that Glass Fabrics was going to have a profitable year in 1965?

THE COURT: Glass Fabrics?

MR. HARDISON: I am sorry. Textura.

Q Do you recall discussing the profitability of Textura with Mr. Schutz in 1965?

A Yes. That was the subject. The progress of the company was the subject. The factory spent all its money in'64. We were recouping it in '65. In April I was -- in April I was -- if he were to tell me I thought we would make a profit in '65, I think that's right, but this was April.

Q Did you tell Mr. Schutz at that meeting that in view of that you were willing to stand by the company in 1965 and issue a personal guarantee?

A Yes. I told him we spent the hard money in '64. We were on our way in '65.

Q Did you make a profit in 1965?

A No. We had a loss of $30,000.

Q I believe in your direct examination in response to questions from Mr. Burgess I will ask you, you testified that, I believe it was on May 3, 1966, you received another request from Burlington for a personal guarantee, is that correct?

A Yes. Jack Cann called me a day or two before May 3rd.

Q You didn't mean to suggest by your testimony that was the first time in 1966 that Burlington had requested a personal guarantee, did you?

A I think they had had a personal guarantee from me in '65 and they wanted it continued.

Q It expired at the end of 1965?

A Yes. Whether they asked me before May or not, but it is likely that they did.

Q Well, do you recall talking with Mr. Donnelly on January 5, 1966 with respect to renewal of the personal guarantee for 1966?

A No. I don't recall.

Q You didn't tell him on that day that you were willing to sign the guarantee and that you would return it shortly?

A No. I had no intention of signing a guarantee after the one I gave him. It had been going on for years and this was an exception that when I gave it to him in '65, by agreement, it would not be renewed.

Q Did you tell Mr. Donnelly -- did you discuss with Mr. Donnelly the fact that you would not renew the guarantee in 1966?

A I don't recall anything specific but -- and I am not saying that he probably didn't ask me for it.

I would have refused it if he had because our agreement was, it was to end in December 1965 and it had and that was that and I didn't need --

Q That was the agreement you made in April of 1965?

A Yes.

Q That was jusf for the year 1965.

A Yes. That was my whole idea. That was the whole idea in my signing it, that it would terminate in 1965.

Q Wasn't there discussion at that meeting that there would be no renewal of the guarantee in '66?

A We wouldn't have put a 1965 termination date on it if that wasn't what we intended.

Q No, I meant did you discuss at the April 1965 meeting whether the personal guarantee would be renewed in 1966 upon the occurrence of any events?

A No.

Q Such as an unprofitable year in 1965?

A I had no idea it was going to be unprofitable. That was April.

Q Do you remember talking to Mr. Donnelly on about March 18, 1966 and Mr. Donnelly insisted on a personal guarantee for the balance of the year?

A No, but it's possible. This request for a personal guarantee went on for ten years, off and on.

Q Did there come a time in 1966 when you had a conversation with Mr. Donnelly about whether you should come to New York to discuss the matter of personal guarantee with Mr. Schutz?

A I don't remember talking about that.

Q You don't remember telling Mr. Donnelly on March 30th, 1966 or perhaps April 1st, 1966 that you were coming to New York to talk with Mr. Schutz about a guarantee, a conversation in which Mr. Donnelly said to you, Mr. Powrie, if you don't renew the guarantee we can't give you more than 60-day terms?

A No, I don't remember that. I think I did -- when I got to New York I think I covered that point with Mr. Schutz, among others. I don't recall talking to Donnelly about that.

Q Then there did come a time when you came to New York to meet Mr. Schutz, I believe you testified?

A I think I testified I met with him in April.

Q Do you recall approximately --

A 1966. I don't recall the date. It would have been, I suppose, while I was on that Clark-Schwebel settlement conference. Which would put it the last week in

April.

Q Was the matter of a personal guarantee discussed between you and Mr. Schutz in April of 1966?

A I'm not certain it was, but it's possible because we discussed things in general.

Q Isn't it possible you discussed that subject and you don't recall a personal guarantee being discussed with Mr. Schutz?

A There was nothing -- I just don't remember that particular point. I don't remember the subject of the conversation. I dropped in to see him because I was there on other business.

Q Didn't you call and set up that meeting with Mr. Schutz on April 25, 1966?

A I probably did. I was in town. I probably called him and asked if he would be free to come over to see him. I did this whenever I came to New York.

Q What did you want to see him about?

A I did this as a routine matter, talked to the sources, both their credit and sales department, whenever I was in New York.

Q You discussed your credit situation with Mr. Schutz in April?

A In general our credit situation is the only thing I would talk to Mr. Schutz about. He was in the credit department.

Q You don't remember on April 25, 1966 agreeing with Mr. Schutz that you would renew the guarantee?

A No, I wouldn't have done that. No, I don't remember agreeing to that.

Q Do you remember speaking with Mr. Jack Cann on the telephone after you went back to the West Coast on or about May 2, 1966, during which Mr. Cann discussed the matter of a personal guarantee with you?

A Yes, I remember that.

Q What did Mr. Cann say?

A He called me on the telephone and said he was mailing guarantee forms to me and they were enclosed, and asked me to sign them.

Q Did you make any objection to Mr. Cann when he raised that matter on the telephone?

A That he was going to mail the forms to me?

Q Yes.

A I don't remember the discussion, but if he asked me if I was going to I probably said no, but he mailed them anyway. It was his job, I thought.

Q You didn't tell Mr. Cann that you would sign the guarantee as promised in New York?

A No.

Q Did you make any objection to Mr. Cann when the matter of personal guarantee was raised?

A When he called me?

Q Yes, on May 2nd.

A I don't recall. I know he called and said that he was sending me a personal guarantee, and I received it in a couple of days. I think the letter said he wanted my wife's signature as well as my own and return them to him.

Q And what did you say?

A At the telephone conversation?

Q Yes.

A Well, I said, "Send them on, if you want to," I suppose. I didn't give him any indication that I was going to sign them.

Q Did you give him an indication that you weren't going to sign them?

A I must have.

Q Why?

A Because it was my policy not to sign personal guarantees except under unusual circumstances, and I had been repeatedly asked for this thing by these three suppliers through the years, and I just was not going to. I didn't own the whole company. I was on a guarantee with Dommerich at the time for a quarter of a million dollars, and that was enough.

Q Did you own the whole company in 1965, when you issued the guarantee?

A No.

Q Was there anything different in that respect in 1966?

A Yes, I thought there was. Mr. Schutz was there, and he said, "What can I do to help, and I had been bragging about how we had been getting along on the expansion program, we were recovering from all the

expenses, and so he kind of caught me at it. He said, "Since you are so confident about the future, would you mind giving us a guarantee," and there I was.

And I said, "Of course not, as long as it ends in 1965."

Q This exhibit is Plaintiff's Exhibit 165, which is already in evidence. Is that the letter that Mr. Cann sent to you enclosing the guarantees?

A Yes.

Q That were discussed on the phone on May 2, 1966?

A Yes.

Q After receipt of the May 3, 1966 letter from Mr. Cann, enclosing the personal guarantee forms, did you have occasion to discuss that matter with Mr. Cann?

A I don't know. I just ignored the forms. I didn't sign them. He may have called back and asked for them. I probably told him I wasn't going to. I don't remember.

Q You don't recall Mr. Cann telephoning you on May 18th and asking you, "Where are the forms that you promised to return"?

A It's likely he did. I don't recall it.

He would have, of course.

Q I am sorry. Did you say you did or did not remember?

A I don't remember that particular occasion. I say it is likely that he did call back, because he had mailed me the forms.

Q What would you have told him had he called back?

A I would have told him I wouldn't sign them. I didn't sign them.

Q You don't remember assuring Mr. Cann on May 18, 1966 that the guarantees would be signed and returned "this week"?

A No.

Q Mr. Powrie, I believe you testified a moment ago that from time to time interest was charged to Textura by Burlington on past due accounts?

A Yes.

Q When would the interest become due and payable, after 80 days?

A After their printed terms.

Q And their printed terms?

A Or the agreed terms. I mean the terms -- if they said you are to pay interest from 30 plus 30-1/2

they would begin at the end of 30 days.

Q But not after 120 days?

A No, the interest was after their printed terms on the invoices.

Q Do you recall having any conversation with anybody in the Burlington credit department to the effect that your terms were 120 so why would interest be charged after 30?

A I don't think we covered that point when the agreement for extended terms was initiated back in New York, and they just charged me interest. I don't think Clark-Schwebel charged me interest. I don't think Clark-Schwebel charged me interest until the end of 1965. I didn't quarrel with it. I appreciated the extended terms and if they charged interest I paid it.

Q Isn't it a fact that had you been willing to stand by the company in 1966 and issue a personal guarantee to Burlington as you had in 1965, that you would have received credit throughout the year from Burlington?

A I did receive credit throughout the year from Burlington.

MR. HARDISON: Your Honor, is this a proper time to break for lunch; I am at a logical stopping place.

Q Just to save everybody's time I will just read one of them to the jury, with the Court's permission.

Exhibit V.

(Mr. McGanney read Defendants' Exhibit V in evidence to the jury.)

Q Do you know if you ever wrote him a letter in reply to this Exhibit V?

A No, I don't remember a reply.

Q Mr. Powrie, you considered it good business practice of the defendants to try to get you to pay your bills faster, did you not?

A Sure. I wanted to pay them faster if I could.

Q But you thought it was good business practice for the defendants to try and bring your accounts into line, didn't you?

A Well, from their point of view -- I can't comment on whether I thought it was good business practice what they were doing. If it was in violation of my arrangement with them, I didn't think it was good business practice.

Q Mr. Powrie, I would like to ask you if this is on page 1307 of your deposition, March 31, 1970, line 11. I ask you whether you recall being asked these questions and giving these answers.

"Did you have accounts payable to them' refer-

ring to the defendants?

"A Yes.

"Q And that was good practice to them?

"A Yes, of course, and to try to step up the payment period if they could."

MR. BURGESS: Your Honor, I think this is ambiguous without reading some of the prior testimony. I would request that Mr. McGanney --

THE COURT: Where would you like him to start reading from?

MR. BURGESS: On page 1306, line 20.

"Q You are referring to the February 25, 1965 letter."

That is Exhibit T which has just been received in evidence.

"A Yes."

There is a quote, Mr. Powrie quotes:

"'As long as I am on a needling kick,' and apparently he," Mr. Nordheim, "is talking about sending me a position of our account and sending me to send some loom to his exchequer, he follows and says, 'As long as I'm on a needling kick, I might as well conclude with the comment there are no goods on the looms for any of the M.G. Powrie companies.'

"He," returning to Mr. Nordheim "is looking for more business at the same time he wrote the letter.

"Those letters were frequent from all three defendants. It was just good practice, as far as they were concerned, to keep reminding me, see how much better I could do.

"Q Did you have accounts payable to them?

"A Yes.

"Q And that was good practice to them?

"A Yes, of course, and to try to step up the payment period if they could. That is good business.

"Q To reduce it to less than a hundred days?

"A Sure."

Do you recall giving those answer to those questions?

A Yes.

Q About the time in July 1965, do you recall Mr. Friedman, Mr. Al Friedman, your general manager, bringing it to your attention that Mr. Nordheim had asked Textura to bring its account within the 60-day period?

A I don't remember that, no. Perhaps he did.

Q Let me show you, Mr. Powrie, what has been pre-marked Defendants' Exhibit 18. It's a memo, hand-

(Defendants' Exhibits Y and Z were received in evidence.)

Q Clark-Schwebel had never before charged you interest on your account, had they?

A I don't think so.

Q But Burlington and Stevens had prior to this time, had they not?

A Yes. Except for that period in '65. I'm not sure when they started but yes, they had before that, yes.

Q And as a general rule you had paid interest to everybody on past due accounts, isn't that right?

Q So it's true that you really had quite unusually favorable credit terms up until this time from Clark-Schwebel, is that correct?

A Yes, we had.

Q You never, in fact, ever did pay any interest on overdue accounts to Clark-Schwebel, did you?

A I don't know. I'm assuming we did, at least from this point December '65 on to March and I'm assuming --

Q Isn't it true, Mr. Powrie, that as part of the settlement arrangement that was entered into with the St. Regis Hotel, Clark-Schwebel agreed to issue a credit for all your outstanding interest charges billed since January 1, 1966?

A Maybe so. I don't remember that.

buildings.

Q To facilitate, in other words, your unusual method of distribution, is that correct?

A We didn't think of it that way. We thought of it as a sales tool.

Q I believe you testified that you had an arrangement with Mr. Clark that you wouldn't be billed for goods until they were called out?

A Yes.

Q Did you also have an agreement as to how long Clark-Schwebel would continue to hold those goods?

A No.

Q Clark-Schwebel might have woven the goods and held them for a year, two years, is that correct, according to your understanding?

A That could have been so. We didn't have an understanding as to when I had to call them out.

Q Do you know that a weaver incurs the bulk of his cost in weaving fabric?

A No, I don't.

Q Do you think it would be a burden for a weaver to hold goods for a year?

A I don't know, but I presume it is warehouse space that costs money. I really don't know whether

it costs them anything.

Q You don't think it would be unreasonable to ask Clark-Schwebel to hold the goods for a year, a year and a half?

A Well, I think probably, and I did, on occasion, when I would be told, not by Clark-Schwebel, but by the other two mills, when the goods were getting very old they would like to bill me. So they wrote a letter, Stevens and Burlington on occasion wrote me a letter, asking me to accept billing.

Q I am asking whether you had an agreement -- I am sorry; proceed.

A So I would either or would not accept the billing, and I usually did, being reasonable, I thought, so they would hold the goods but bill me for them. I don't think Clark-Schwebel ever did that, except when we got into March, 1966.

Q Did you consider that you had any oblogation to call out the goods within any period of time?

A No.

Q Mr. Powrie, I would like to refer you to your deposition, page 1243, taken on March 31, 1970, and ask you if you recall being asked these questions by me and giving these answers, page 1243, line 14:

"Q Did you consider that you had any obligation to call out the goods within any period of time?

"A Well --

"Q After that specified on the contract?

"A Yes, I considered I had some obligation. It was just a matter of fairness. After a while, if they got too old -- sometimes it was identified with a tax problem, in that the inventory tax would be applied if the goods were being held in Los Angeles.

"If I owned them, I was subject to the tax, and it wasn't fair to ask the mill who was accommodating me to take that burden on. That quite often got into the discussion. I think it got into the discussion with Clark-Schwebel on one occasion.

"I don't recall --

"Q What did you consider a reasonable length of time?

"A Well, it varied with the fabric. There was no specified length of time. I suppose one year would be certainly time that we -- if it was J. P. Stevens, I would be talking to them about it."

Do you recall being asked those questions and giving those answers?

A Yes. That is substantially what I got through saying.

Q I refer you further to page 1265, the same place, the same time, line 6:

"Q Did you have any idea what Mr. Clark thought a reasonable time would be?

"A Oh, I would say if he held them a year, it would be unreasonable. Then I think we were in agreement on that.

"I don't know why you're -- this wasn't all that precise an arrangement. It had to do somewhat with how much pressure and what the reasons were that one of the mills would ask me to take these goods, or to bill and hold them to me."

Do you recall being asked those questions and giving those answers?

A Yes.

Q Is it your belief that one year is an unreasonable length of time for the weaver to hold the goods?

A For most of the one year -- Stevens, I recall, Hess began to talk to me about it, about one year, and this incident you mentioned there in my deposition had to do with the fact that these goods were being held in

Mr. Nordheim wanted to have something worked out by the 15th of December on this?

A No, I don't remember.

Q In fact, you didn't call out these goods before the end of 1965, did you?

A What goods?

Q The goods that had been holding at nine months to twelve months.

A I have no idea, unless I looked at -- I don't really know. You are talking about a number of weaves and thousands of dollars worth. Whether I drew out something of a certain age I would have no recollection. I have no reason to recall it. It didn't matter to me.

Q I show you the schedules again attached to Exhibit AD. I ask you if by looking at that schedule you can tell us in fact whether some of those goods were being held by you as late as July, 1966 in the warehouse.

A Held by me, did you say?

Q That they were being held by Clark-Schwebel in the warehouse for you as late as July, 1966.

A I don't know how I would tell from this. Maybe you can help me.

Q If I showed you the settlement letter of August 4, 1966, would that refresh your recollection as to what goods were being held for you?

A Is this two sheets or is it a continuation of one? I can't read this. Shall I open it up and join it? It looks to me as if that's what it is.

Q Yes, sir.

A Is this one long sheet?

Q Yes, sir.

MR. MC GANNEY: I show the witness Plaintiffs' Exhibit 166.

A What's the question.

Q The question is: Can you tell me whether these goods that were being held nine months, ten months old, in 1965, were they still being held on August 4, 1966?

A Homespun and Linweave and Civic are, as far as I am concerned they can still be held due to their quality.

Q But they were being held?

A I would never have called them out.

Q The answer is they were being held in August of 1966, is that correct, Mr. Powrie?

A Yes. If that's the date of that letter,

I suppose it's right.

Q Plaintiffs' Exhibit 166 is dated August 4, 1966.

A All right.

THE COURT: We will take a short recess.

(Recess.)

(In open court; jury present.)

BY MR. MC GANNEY:

Q Is it true, Mr. Powrie, after Mr. Clark died in October, 1964 you never received satisfactory quality adjustments from Clark-Schwebel?

A You say did we never receive them?

Q After October, 1964.

A That's right. We didn't receive any after that date.

Q You received a couple of small adjustments, did you not?

A Not for quality, that I recall.

Q Isn't it true in 1964, after Mr. Clark's death in 1964, that was Mr. Nordheim's policy, not to give you any quality adjustments?

A I don't know if it was Mr. Nordheim's policy, but we did not get any quality adjustments from Mr. Clark's death in October, 1964.

Q Right through the end of December, 1966?

A Yes.

pm

Q You did get quality adjustments from Burlington and Stevens?

A From '64 on?

Q Yes.

A Yes, sir.

Q So Clark-Schwebel's policy was unique?

A Yes. Their whole operation was unique.

Q You make no claim here, do you, Mr. Powrie, that Clark-Schwebel discriminated against you in not giving you quality adjustments, do you?

A They must have. They couldn't have treated all their customers like they treated me. They wouldn't have any.

Q Did you ever have any conversation with any of their customers about quality adjustments they were getting from Clark-Schwebel?

A Yes.

Q Who was that, sir?

A Robert Silverstein or Roscoe Products in Boston and his father-in-law, Nate Rosen.

Q And when did that take place?

A While we were still in business. I'm not certain of the date. I'm not certain ofthe date. It was the only trip I made to Boston to see them.

2151 yards our finish.

3750 yards Clark-Schwebel finish.

Q Mr. Powrie, does that refresh your recollection that in fact Clark-Schwebel did not finish all the fabrics for --

A I am still certain they did.

Q You are certain that your letter of May 6, 1966, was incorrect when you submitted that claim to Clark-Schwebel?

A It has to be.

Q And your previous testimony was incorrect?

A Yes.

Q Textura never did, in fact, replace the fabric on the Golden Gateway Center, is that correct?

A No, we were out of business. We committed ourselves to do that.

Q You didn't replace the fabric?

A No.

Q It is your claim, is it not, Mr. Powrie, that the rejection of your quality claim on the Spartan fabric was a Clark-Schwebel decision alone, is that not correct?

A I'd have to have that again.

Q Is it your position that the rejection of your quality claim regarding the Spartan fabric was a Clark-

Schwebel decision alone, is that not correct?

A You mean did another defendant --

Q That Mr. Nordheim made up his mind on that subject?

A As far as I know. I don't know who he talked to.

Q As far as you know, Mr. Nordheim made that decision?

A As far as I know, yes.

Q Now, about this time you also had a quality complaint about Civic, did you not?

A Yes.

What time is this now? '65?

Q I'm sorry. Early 1966.

A Yes.

Q And you raised your claim as to poor quality as to Spartan and Civic in your answer to the arbitration proceeding, did you not?

A Yes.

Q And in fact, the agreement that was reached and reflected in the August 4th letter indicated that you will get a credit on those two styles, is that not correct?

A I'd have to see that agreement again. I think it is.

This is only a credit for the 44-inch width of Spartan. The big problem was much greater than this. About 14,000 yards or 20,000 yards.

Q So you didn't get all the credit you were looking for, or did you, Mr. Powrie?

A I didn't get anything I was looking for in that agreement.

Q You did get a credit of $8400, did you not?

A After I paid them $70,000 for a warehouse full of junk.

Q How much did you pay, Mr. Powrie?

A The agreement was to pay them 77 --

Q I'm asking how much you paid, Mr. Powrie?

A On that particular agreement?

Q Yes, sir.

How much did you pay?

A On that particular agreement -- it was never signed. I didn't pay anything.

Q Did you ever pay any money to Clark-Schwebel with respect to the settlement of the arbitration agreement?

A $5000.

Q There is no question, Mr. Powrie, is there that you had canceled the order on Morro, is that not correct?

A Of course there is a question. Yes, there is

a question.

Q There is a question?

I show you Plaintiffs Exhibit 827 in evidence. I would like you to read that to the jury, please.

A This is a letter of May 6th to Raymond Nordheim from me and it says:

Dear Ray. As I recall you said you were holding up our order on our style Morro, your style 2417/3 pending settlement of our differences. Please cancel that order and we will replace it at a later date.

Q That's signed by you, is that correct?

A That's right.

Q Did you ever replace that order with Clark-Schwebel?

A No, that was my way of withdrawing the problem and trying to get it woven elsewhere.

Q You never did replace it after you canceled it?

A No. We never did get back in any working arrangement with Clark-Schwebel.

Q Your answer is no?

A The answer is no.

Q Now, there is no provision in any of your contracts with Clark-Schwebel that would permit you to take a credit against the amount owing Clark Schwebel, is

there?

A No.

Q The contract provides that any controversy would be referred to arbitration, is that not right?

A On the point of credits? Well, any dispute thatcouldn't be resolved, yes. That's what I understand.

Q Do you know whether arbitration of quality claims is a usual practice in the textile industry?

A I don't know.

Q Let's move on to the July 29th meeting.

Where did that meeting take place?

A July 29th? We are talking about the St. Regis meeting?

MR. BURGESS: Could I have that question back again. I missed it.

(Question read.)

Q Yes, sir, I am talking about the St. Regis meeting?

A In the St. Regis hotel.

Q Whose hotel room was that?

A Mr. Grafstrom.

Q Did Mr. Grafstrom have more than one room?

A He had a parlor and a bedroom.

Q Had Mr. Schwebel and Mr. Nordhein previously

Schwebel?

A I could tell by looking at it, by handling it, and besides I got this panel from the building and sent it to them with this letter.

The finish on Menardi's and Clark-Schwebel's was quite different. Clark-Schwebel's was very heavy and bulky and caused ripples in the fabric we complained about. There is no question that the panel came from that building and was finished by Clark-Schwebel.

Q Mr. Topkis asked you a number of questions concerning the St. Regis meeting between yourself and Mr. Grafstrom and Mr. Schwebel and Mr. Nordheim.

Mr. Powrie, did you agree at the St. Regis meeting to the terms that were verbally demanded by them, by Clark-Schwebel, at that meeting?

A Yes.

Q You testified on cross examination by Mr. Topkis that in November of 1966 J. P. Stevens, the defendant J. P. Stevens, was willing to help you by agreeing to transfer certain confined weaves to the Stern Company. Now, was the Stern Company a converter?

A Yes.

Q Was it a converter which distributed in what we have referred to previously as the traditional

to Clark-Schwebel because they had us on a cash basis.

Q The St. Regis agreement called for payments by Textura subsequent to July, did it not?

A Yes.

Q Was Textura able to generate cash subsequent to July to make these payments?

A We basically had no fabrics from either Burlington or Clark-Schwebel that we could sell to generate cash with. We had some, but very little.

Q And at that time were you receiving extended credit terms from the defendants?

A No, they had shut down extended credit terms. We were on a much shorter time, so we had to pay out more cash for that.

Q And Clark-Schwebel had continued on a cash basis, isn't that true?

A That's right.

Q And at the same time, according to the chart furnished by Mr. Hardison, you had received no more deliveries of crown in July and a substantial diminution in your other deliveries from Burlington, isn't that correct?

MR. HARDISON: I object. I think that chart will speak for itself. I am not sure that is

accurate. It is a misleading characterization, anyway.

THE COURT: I will sustain the objection as to the form of the question. It sounds more like the attorney testifying than the witness.

Q Did your deliveries subsequent to July for Burlington continue on the same basis they had continued from that point?

A No, they dropped from about $133,000 to $14,000-plus for the second five months of the year.

Q After July what was the status of your reserve account with Dommerich?

A About that time they were holding as high as 85, 87 thousand dollars of our money.

RECROSS EXAMINATION

BY MR. TOPKIS:

Q Mr. Powrie, between the end of July and the end of September you paid certain notes that you had outstanding, didn't you, in 1966, that is?

MR. BURGESS: Your Honor, I don't believe this was gone into on redirect.

MR. TOPKIS: I thought that was gone into most precisely:

What did he use his profits for, was the line of questioning.

MR. BURGESS: I believe that was addressed to the months up to July, 1966, those questions.

THE COURT: I didn't understand that.

Q Mr. Powrie, in August and September after making your deal with Clark-Schwebel you made substantial payments on notes that you had outstanding to other parties than the defendants, didn't you?

A No, we made some routine payments, the company did, on the Dommerich note.

Q Well, you had notes payable of $34,000 at the end of July and $26,000 at the end of September, so you paid down $8000?

A Not in the months you're indicating. During

the year we paid that down, that total amount I mentioned.

Q Sir, I show you Exhibit 43 and Exhibit 45 and ask you to compare the two and ask you to tell me, please, whether you did not pay down $8000 on those notes?

A I will agree to that without looking. Those are the payments I'm talking about, but not $73,000 to $36,000. I told him I paid down two installments in those months on the Dommerich note, but I testified to the fact that we paid $73,000 down to $36,000 --

MR. BURGESS: I would like to establish what months are involved In that, Mr. Powrie.

THE WITNESS: Two months.

MR. BURGESS: From 73 to 36?

THE WITNESS: Oh, that was from the first of the year.

MR. BURGESS: Down to what month?

THE WITNESS: To August.

MR. BURGESS: Very well.

BY MR. TOPKIS:

Q And between the end of July and the end of September your factor paid you a net of $18,000? Isn't that right?

A I don't know.

Q Well, you have due from factor as of July 31,

$73,000; due from factor as of September 30, $55,000?

A That means the factor gave us $18,000 of our own money between those dates.

Q It was $18,000 in cash you received?

A Of our own money.

Q Yes, the reserve you were talking about?

A That reserve fluctuated.

Q And it was reduced by the end of September by $18,000 as compared with the end of July?

A I don't remember whether it was or not, but I will agree with you.

MR. BURGESS: I would appreciate in answering a question if you refer to the balance sheet.

THE COURT: I would appreciate if counsel would not jump up in the middle of questioning and interrupt the examination by other counsel.

Q Your inventory, that is to say, your stock of goods on hand increased between July and September by $13,000, didn't it?

A Yes.

Q And that is merchandise that you bought from the defendants?

A I don't know whether it is or not. We bought merchandise from lots of people. It may not have been

from the defendants at all.

Q I see on the July 31 statement, Mr. Powrie, an item marked "Due From Employees and Officers $19,829."

A I testified to that already and that is on there, yes.

Q Who were those employees and officers?

A testified they were myself and Mr. Johnstone, 11,000 for me and 8,000 for him.

Q You and Mr. Johnstone paid to Textura those sums between July and September?

MR. BURGESS: Objection, your Honor. It has been asked and answered. It was not gone into on direct.

MR. TOPKIS: The subject, your Honor, was gone into on redirect.

THE COURT: You put those statements in on redirect. That opens this for examination.

Objection overruled.

Q So you and Mr. Johnstone paid to Textura between July and the end of September a total of $19,828?

A You know I didn't testify to that.

Q I am just ask you, Mr. Powrie.

A No, you are not asking me; you are telling me.

THE COURT: Mr. Powrie, just answer the questions --

A You made a statement. What is the question?

THE COURT: -- as directly as possible, and without any side remarks.

THE WITNESS: I'm sorry, but I have been badgered for eight years. I am a little raw.

Now, what is the question? Just the question. I will answer the question, but don't make a statement to me.

Q Mr. Powrie, all I am asking you, sir, is to compare these two balance sheets. On one of them, the July 31st one, I see an entry marked, "Due from employees and officers, "$18,828.70," and I see no corresponding entry on the September 30th one.

A Yes.

Q I ask you, you having told me that that $19,000 was owed by you and Mr. Johnstone, did you during those two months, you and Mr. Johnstone, pay to Textura that

$19,000?

A I am back where we started. I testified we did not pay it.

Q Why did it vanish from the balance sheet?

A I testified it was written off. We took it as income, and I have testified to that, Mr. Topkis.

Q Oh. So Textura paid to you and Mr. Johnstone this $19,000 during those two months; is that right?

A No, they did not. They wrote it off.

Q They forgave the debt?

A Right.

Q And you accepted that forgiveness?

A Yes. I had also not taken $55,000 in commissions over a period of years.

Q Did you by any chance tell any of the defendants between July 31st and September 30th, 1966, that you, Mr. Powrie, had decided to forgive Mr. Powrie's debt and Mr. Johnstone's debt in the amount of $190,000?

A Yes, I testified to that.

Q When did you tell anybody that?

A On the deposition.

Q Oh, many years later. I asked you whether between July 31st and September 30th you told anybody of the defendants that you, Mr. Powrie, had forgiven Mr.

Powrie and Mr. Johnstone $19,000 of debt?

A I don't know whether they asked me.

Q You certainly didn't make a point of telling them, did you?

A (No response.)

MR. TOPKIS: I have nothing further.

BY MR. MC GANNEY:

Q Mr. Powrie, looking at the income statement on the June 30th statement, you did know, did you not, that the Del Webb sale in the amount of $66,000 was included in that June 30 sales figure; is that correct?

A I testified I did yesterday.

Q You knew that the job had not been commenced at June 30, 1966?

A Yes.

Q You also knew that the Del Webb sale was not included in the July 31, 1966 income statement; is that correct?

A Did you say was not included?

Q Was included.

A Yes, it was included.

Q And you knew the job had not been commenced as of July 31, 1966?

A I have testified it wasn't commenced until

August.

Q So you did know it wasn't commenced on July 31, 1966?

A I did know that, yes.

Q Now, it is true, is it not, Mr. Powrie, that the footnote in Plaintiff's Exhibit 42, which I read: "Note: Sale in the amount of $66,000 reflected in this statement partially completed at June 30, 1966" -- that refers to the Del Webb job, does it not?

A Yes.

Q And I believe we established before that it wasn't partially completed as of June 30, 1966?

A That's right.

Q And no such footnote appears in the July 31, 1966 statement at all; does it?

A No, it doesn't.

Q And there are other instances included in both the June and July income statements of sales, of invoices, that were dated after the close of those months; is that correct?

A I testified that I think that with one exception every month we held it open for a while and put the July sales into June, August sales into July.

Q And you testified you did that so that you could

make the previous month look as big as possible in sales; is that right?

A That was the purpose.

Q And you didn't tell the defendant mills about that; is that correct?

A No. These were our in-house statements for our own use, and if they wanted to look at them they could.

Q But you submitted the in-house statements to the defendant mills, did you not?

A I delivered anything they asked for. Anything they asked for I delivered to them.

Q So you delivered the in-house statements to them?

A I don't remember delivering anything to them, but if they asked for it they were able to get them, because they could talk to anybody they wanted and take any paper work we had.

Q Did you take the July 31, 1966 statement to New York and deliver it to Mr. Nordheim and Mr. Schwebel when you came in September 1966?

A Let me have it again. Did I bring my June statement?

Q Did you bring your July 31, 1966 statement to New York and give it to Mr. Schwebel and Mr. Nordheim in

September 1966?

A I don't know. You are talking about that meeting we had at the 12 Caesars? I don't think we had any statements there. That was a luncheon meeting.

Q Is your answer you don't recall?

A No, I didn't bring them. I don't remember any statement or any paper work at all.

Q Do you remember ever giving your July 31, 1966 statement to Mr. Schwebel and Mr. Nordheim?

A No, I don't.

MR. MC GANNEY: I have no further questions.

MR. HARDISON: Your Honor, I have just a few.

EXAMINATION BY MR. HARDISON:

Q Mr. Powrie, you have testified now with respect to the Del Webb transaction, adn you offered an exhibit during my examination the other day which is Defendant's P. I would like to show that to you, if I may.

While you are looking at that, I would like to mark as a defendant's exhibit for identification AF.

(Defendant Exhibit AF was marked for identification.)

Q Mr. Powrie, have you had a chance to look at Exhibit P I have just placed before you.

A Yes.

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Q Didn't you testify that this is the letter of July 7, 1966, which was sent to Dommerick -- a copy of the letter that went to Del Webb that was sent to Dommerick on July 7, 1966?

A Yes.

Q And that letter enclosed an invoice?

A The original?

Q I'm sorry; the original was sent to Dommerick or to Del Webb?

A I'm sorry, it was sent to Del Webb.

Q The original?

A Yes. The copy went with this letter. If this is a copy it went to Dommerick, and it appears it is.

Q Now, could I show you Defendant's Exhibit AF for identification. I ask you to identify that document, if you can.

A Yes. This is the same letter as P.

Q. By "the same letter," you mean a copy of that letter?

A It appears to be, because it is footnoted as to who the copy went, Del Webb. The other one went to Dommerick.

Q If you turn to the second page of P, the invoice that is attached to that exhibit, is that the invoice

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that was sent to Dommerick or to Del Webb?

A The original was sent to Del Webb, and I told Mr. Hornickle why I was doing that.

Q I understand. But the thing that confuses me is you have your stamp on the invoice you sent to Del Webb.

MR. BURGESS: I don't know how we can tell from these copies what was sent to whom.

MR. HARDISON: I think he just testified that Defendant's P is a copy.

THE WITNESS: These are all copies.

Q But this is a copy of the letter of July 7, 1966, and didn't you testify that Defendant's P was sent to Del Webb?

A No, the other way around.

Q I'm sorry, to Dommerick.

A Yes.

Q Excuse me. And didn't you also testify that invoice 4235, which is attached to that letter, was also sent to Dommerick?

THE COURT: A copy of it?

MR. HARDISON: A copy of it.

THE COURT: The original was sent to Del Webb.

MR. HARDISON: That's right.

A Right. That's right. Are you on the point of the

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stamp on one and not on the other?

Q Yes. That's what is confusing.

A It is confusing. And I don't know who put these things together, but let me just reiterate that your AF is the copy that we sent to Dommerick, and attached to it was a copy of the invoice, and this one called P was the copy which was sent to Dommerick, and a copy of the invoice went to them.

I don't know whether Dommerick put the stamp on there or whether this is actually a true copy of what was sent to them. I don't know. This is confusing, but that's what happened.

MR. HARDISON: I would like to offer Defendant's AF in evidence. I believe Mr. Powrie has identified it.

MR. BURGESS: I would have no objection to the second half of that exhibit. I don't know how there is any way we can tell which copy was sent. This is just a xerox.

THE COURT: I will overrule the objection.

(Defendant's Exhibit AF was received in evidence.)

Q If you examine the copy of the letter of July 7, 1966 --

MR. HARDISON: Your Honor, would it be possible for me to submit copies of these to the jury? It is an

important issue, and it is confusing, and I think the jury might be able to follow it with copies of the exhibits.

THE COURT: All right. They have heard the testimony on it. Maybe I ought to get acopy, too.

Q Mr. Powrie, you say you don't remember who put the stamp on the second page of Defendant's Exhibit AF.

A Mr Hardison --

Q Exhibit P, I'm sorry.

A Let me just, so we get what I am testifying to, say it again -- that AF is the copy of the letter I sent to Del Webb. Attached to that was an original invoice from our office. I can't tell you whether this attachment is it or a picture of it, or what. P is a copy of a letter I sent to Del Webb which went to Mr. Hornickle, after I called him and read it to him. I sent him a copy of the invoice that I sent to Del Webb. And beyond that, I can't explain these documents as to how the stamp got on or whether this is a picture of the real thing.

Q You don't recall today placing the Dommerick stamp on the copy that went to Dommerick?

A I don't remember that, no.

Q Do you recall putting it on the copy that went to Del Webb, the original?

A I didn't ever put the stamp on anything personally.

I don't know.

Q Who was responsible for that?

A Someone in our office. Miss Sharpe or one of her helpers.

Q Miss Sharpe?

A Or one of her helpers.

THE COURT: Both of these letter, AF and P, are letters to Del Webb.

MR. HARDISON: Yes, your Honor. That's what I am trying to figure out. I believe the witness testified -- and correct me if I am wrong, Mr. Powrie -- that P is a copy, or is the same letter as AF.

Q Is that correct, Mr. Powrie?

A Yes. It is supposed to be. It is supposed to be a copy one of the other. I sent the original to Del Webb and a copy to Mr. Hornickle.

Q And is AF a copy of P?

A Well, not in every respect. There is writing on P.

Q I mean with respect to the typewriting.

A No, that looks like it's been reduced or something.

Q It's been reduced?

A Well, I don't know what is -- I have never seen

these copies before.

Q The thing confusing about this, Mr. Powrie, is if you look at these letters side by side they do appear to be the same, but if you hold them up to the light and superimpose one on the other it appears that they are not the same.

MR. BURGESS: I object to this.

A It does. They are the same.

Q Did you say it does appear that way?

A You said it. I can't be responsible for duplicating machines. There is no question in my testimony that I sent the original to Del Webb and a copy to Dommerick, and this foolishness is -- the verbiage is the same is what I am testifying to. Whether they are reduced on copying, or that, that's --

THE COURT: Exhibit P bears the notation "original invoice mailed to customer Mr. Hornickle knows," and under that it says "Del Webb Corporation $68,825.00."

MR. HARDISON: I believe this particular document came from Dommerick files, and that this was a notation placed on there by someone at Dommerick.

Q Mr. Powrie, could you tell me whether Dommerick advanced you any money on this Del Webb invoice?

A I don't know whether they did or not.

Q You don't know whether they advanced you $30,000?

A Yes, they advanced $30,000.

Q Is that all?

A They didn't advance any money directly against this job, if that's the question. They didn't advance moneys directly against any job or any particular invoice. They sent us lump sums from time to time unrelated to what they purchased.

Q Did Del Webb pay Fenestra funds on this contract, on this invoice?

A I am not sure they paid Fenestra or -- on this invoice?

Q Yes, on the Del Webb invoice.

A We sent Del Webb invoices subsequent to this, and I am asking whether you are asking whether they paid this invoice. They did not pay this invoice.

Q They did not pay the invoice --

A The attachements here, no, they did not pay that.

MR. HARDISON: Would you mark this as Defendant's Exhibit AG for identification.

(Defendant's Exhibit AG was marked for identification.)

Q Will you identify Defendant's Exhibit AG for identification, if you can?

A I can read the figures. I am not sure I can read anything else. I can't read what the first word on the first line is, except it says -- no, I can't read the words, but I can read the figures.

THE COURT: Can we have the original of these documents?

MR. HARDISON: I don't at the moment have them.

Q Can you read the wording "Sold to Del Webb Corporation"?

A Yes, it says "Del" something. Are you talking about"Sold to"?

Q Yes, sir.

A Yes.

Q And do these figures in the body of the exhibit refreshyour recdlection as to what this is? Does that appear to be $68,625?

A I think I know what it is, if you want me to say that. I can't read it.

Q Yes.

A The first word is supposed to say "original contract," or some -- that's the first contract, and the next word, I am sure, says "supplemental," though I can't

read it.

Q Is that the Del Webb contract?

A Yes, that would be the total amount of the Del Webb contract, plus a $2,071 supplement.

Q Do you recall sending this invoice to Del Webb?

A I don't recall sending it, but that's the time we starting billing them, August 25th.

Q You don't recall placing the legend on the invoice "Paid to Dommerick," we saw a moment ago?

A I didn't prepare every piece of paper in our office. I didn't make up this invoice, and I didn't put any stamp on any invoice. We put out about 350 a month.

Q Did Del Webb ever pay Fenestra any money before the end of 1966 on the Del Webb job?

A Did they ever pay them any?

Q Yes. Or Textura?

A They must have. We started billing in August. Yes, my recollection is there was a balance at the end of the year of $13,000 that was uninvoiced.

Q Did Del Webb pay you some funds, though, Fenestra, during 1966?

A They must have.

Q On the Del Webb job?

A I don't know for sure. I think they did.

MR. HARDISON: I would like to mark this next exhibit Defendant's Exhibit AH for identification.

(Defendant's Exhibit AH was marked for identification.)

MR. HARDISON: I'm getting a little ahead of myself.

Could I offer Defendants' Exhibit AG for identification in evidence.

THE COURT: AG was not received yet?

MR. HARDISON: No.

THE COURT: Yes, that is received.

(Defendants' Exhibit AG was received in evidence.)

xx BY MR. HARDISON:

Q Have you had a chance to look at Defendants' AH for identification, Mr. Powrie?

A Yes.

Q Can you identify that document?

A This is a letter addressed to Fenestra Fabrics from F. W. Danielseon, who is manager of projects for Del Webb, dated August 22, 1966.

Q Do you recall receiving a copy of this letter?

A Yes.

MR. HARDISON: Your Honor, I would like to offer AH for identification in evidence.

THE COURT: Received.

(Defendants' Exhibit AH was received in evidence.)

xx

MR. HARDISON: With your permission I would like to read this short letter.

(Mr. Hardison reads from Defendants" Exhibit AH in evidence to the jury.)

MR. HARDISON: I have no further questions.

REDIRECT EXAMINATION

BY MR. BURGESS:

Q Mr. Powrie, I would like to show you Defendants' Exhibit P in evidence and refer you to the notation at the bottom of the page. This is a copy which was obtained. I believe Mr. Hardison stated, from the files of Dommerich. I call your attention to the printing at the bottom "Original Invoice Mailed to Customer Mr. Hornickel Knows."

Now, did you or anyone from your office put that notation on that letter?

A No.

Q I would like to show you Defendants' Exhibit AH in evidence, which Mr. Hardison just read to the jury, and I note that that letter is dated August 22, 1966 and it refers to an invoice dated July 7, 1966, and a telephone conversation alleged to have taken place on July 14, 1966.

Did, in fact, Mr. Danielson call you on that date?

IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 75-7332

Carlyle Michelman, Trustee of Textura, Ltd., in Bankruptcy Proceedings, Plaintiff-Appellee

v.

Clark-Schwebel Fiber Glass Corporation, and Burlington Industries, Inc., Defendants-Appellants

AFFIDAVIT OF SERVICE

I, Charles F. Hooper, an agent of the law printing firm of Byron S. Adams Printing, Inc. of Washington, D. C., do hereby certify that copies of a 3-volume Joint Appendix in the above-entitled case were served on each of the following by first class mail, with proper postage affixed:

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Thomas McGanney, Esq., White & Case, 14 Wall Street, New York, New York 10005

Charles F. Hooper

SUBSCRIBED AND SWORN TO before me this 20th day of November, 1975.

Notary Public, D. C.

(SEAL)

My Commission Expires May 14, 1976